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## **Clarifying the scope of labour exploitation in human trafficking law**

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# Clarifying the scope of labour exploitation in human trafficking law

## *Towards a legal conceptualisation of exploitation*

Proefschrift ter verkrijging van de graad van doctor aan Tilburg University op gezag van de rector magnificus, prof. dr. K. Sijtsma, en de Vrije Universiteit Brussel op gezag van de rector magnificus, prof. dr. C. Pauwels, in het openbaar te verdedigen ten overstaan van een door het college voor promoties aangewezen commissie in de Aula van Tilburg University op dinsdag 17 december 2019 om 10.00 uur door

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*“Acknowledge the Tragedy, Consider the Legacy, Lest we Forget”*  
Permanent Memorial to Honour the Victims of Slavery and the Transatlantic Slave Trade, Ark of  
Return, United Nations Headquarter, New York

*“[E]nding exploitation starts when you are regularised. It is then when the person  
can breathe. [...]”*  
(female from Sub-Saharan Africa, domestic worker, regular migrant)

*“In Nepal, and in Asia, in general, there is this thinking about Europe: in Europe they  
treat people with respect for human rights; they treat people in a nice way.”*  
(male from Southern Asia, agriculture, regular migrant)

European Union Agency for Fundamental Rights, *Protecting migrant workers from exploitation in the  
EU: workers’ perspectives* (June 2019)



## ABSTRACT

The agreement of the international definition of human trafficking in the 2000 Palermo Protocol is a noteworthy achievement, welcomed for providing the first internationally agreed definition of the offence. However, this international definition fails to provide clarity as to the exact scope and meaning of exploitation. Instead, it consists of an open-ended list of forms of exploitation that “at a minimum” amount to exploitation. Labour exploitation is enumerated as forced or compulsory labour, slavery or practices similar to slavery and servitude. This adds confusion since these forms of exploitation are also separately legally defined and criminally prohibited. Despite the international recognition of these severe forms of labour exploitation, the current legal framework thus engenders a lack of clarity as to the threshold between decent working conditions and labour exploitation. This thesis will address this legal gap by seeking to legally conceptualise labour exploitation.

The state-of-the-art legal understanding of labour exploitation reveals that the international definition of human trafficking has, in the most part, been replicated in both regional and domestic settings (Part I). However, the contemporary understanding of labour exploitation remains thwarted by confusion and conflation of legal terms, as we exemplify in this thesis by reference to the jurisprudence of the European Court of Human Rights. Legal ambiguity hinders the full understanding and implementation of existing legal frameworks that seek to combat labour exploitation and fails to protect those who are subject to exploitative working practices, regardless of whether they are considered to be trafficked persons or not.

The research adopts a cross-disciplinary exploration of the topic using a legal analysis (Part I) and a political theory analysis (Part II). Building on these findings, we comparatively analyse the judicial interpretation of labour exploitation in 72 criminal cases of two European national legal orders: Belgium and England & Wales (Part III). This allows us to develop a roadmap of its judicial understanding from which we conceptualise labour exploitation as: *A knowingly taking unfair advantage of B’s position of vulnerability by means of the exercise of control showing a lack of respect for B’s human dignity, in order to gain a benefit.*

The proposed conceptualisation and its accompanying key constituent elements provide for consistency and legal certainty (Part IV). They are envisaged as a springboard for future efforts seeking to tackle labour exploitation. Whilst the thesis’ emphasis is premised upon the analysis of criminalised forms of relational exploitation (exploitation by individuals on other individuals), we acknowledge the need to ensure that not only criminal law is galvanised to tackle this issue. Other law and policy areas are needed to address not only relational but also the structural features of our global, neo-liberal labour market and societies that exacerbate and fuel the instrumentalisation of millions of workers in a precarious situation. As such, this conceptualisation must be complementary to additional measures that secure the respect for the human and labour rights of all whose labour is exploited, whether trafficked or not.



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# INTRODUCTION

## 0. Introduction and structure of the chapter

In recent decades, there has been much focus on human trafficking in law, policy and academia with a significant achievement being the promulgation of an internationally agreed definition in Article 3(a) of the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (hereinafter the Palermo Protocol). The Palermo Protocol defines the international crime of human trafficking as:

*Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. **Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs** [emphasis added].<sup>1</sup>*

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<sup>1</sup> Article 3 United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime*, New York, 15 November 2000, UNTS, vol. 2237, p. 319, Doc. A/55/383.

The definition of human trafficking consists of three constituent elements, the action, the means and the purpose. The emphasis in this thesis is the latter as the Palermo Protocol fails to define the meaning of the term exploitation. Instead, different forms of exploitation are non-exhaustively listed. Moreover, the use of a phrase “at a minimum” suggests that there is room for manoeuvre. The adoption of a non-exhaustive and enumerative approach to exploitation in international law means that the concept remains undefined. This thesis will address this legal lacuna by seeking to better understand the interpretation of the material scope of exploitation in the context of human trafficking for the purpose of labour exploitation,<sup>2</sup> wherein the enumerated forms of exploitation include, forced labour or services, slavery or practices similar to slavery, servitude.<sup>3</sup> More broadly, in this thesis we use labour exploitation to refer to the criminalised standalone forms of exploitation. It can also be used to encapsulate an as yet undefined broader understanding. Namely, those working conditions that do not amount to decent work but equally do not satisfy the definitions of any of the standalone prohibited forms of exploitation. Such conditions could in fact amount to exploitative working conditions but are not formally categorised as such due to the lack of clarity as to the threshold of labour exploitation – it could be argued that this grey area is recognised and captured in the trafficking definition by use of the phrase “at a minimum”.

The international community’s focus on human trafficking has led to a global response premised upon the criminalisation of individuals who seek to exploit others. However, in the context of human trafficking for the purpose of labour exploitation, the effectiveness of such a global prohibition regime falls into question when the most recent International Labour Organisation (ILO) global estimate of 24.9 million people, at any given time in 2016, subjected to forced labour is contrasted with a low – but admittedly slowly increasing – number of prosecutions.<sup>4</sup> It is important to highlight

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<sup>2</sup> We recognise that “trafficking for the purposes of labour exploitation” is not articulated as such in the international legal definition, but we wish to use this term to collectively refer to the forms of labour exploitation that are explicitly listed in the Palermo Protocol, namely: forced labour or services, slavery or practices similar to slavery, servitude. Hereinafter, in order to make a clear distinction between the different forms of labour exploitation in law, when discussing human trafficking we will collectively refer to these forms as human trafficking for the purposes of labour exploitation and when discussing these forms of labour exploitation outside of the trafficking context, we will refer to them as standalone offences.

<sup>3</sup> This understanding of human trafficking for labour exploitation follows the Council of Europe who makes the same categorisation, see Council of Europe, *7th General Report on GRETA’S Activities* (2018), p. 34; Council of Europe, *Ready for future challenges - Reinforcing the Council of Europe - Report by the Secretary General for the Ministerial Session in Helsinki*, 16-17 May 2019, CM-Public SG (2019) 1 01/04/2019, p. 29.

<sup>4</sup> ILO, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, Geneva, September 2017; UNODC, *Global Report on Trafficking in Persons* (Vienna: United Nations, 2018), pp. 45-46.

that even here the lack of clarification of labour exploitation comes to the fore, whereby the recent ILO estimate of forced labour mentioned above has been combined with forced marriage and child labour to reach an estimated 40.9 million people in “modern slavery”. Notwithstanding the discrepancies and discussions regarding the accuracy of estimates of the scale of labour exploitation, the disparity between the scale of the problem and the efforts at tackling them are indicative of the complexity of this phenomenon. We acknowledge that criminal prosecutions alone will not address the issue requiring a broader response that goes beyond the law, and in particular the criminal law. However, we contend that the existing criminal law framework for combating labour exploitation still also requires attention to ensure that measures that seek to prevent and protect those who are vulnerable to exploitation are effective. The need for continued evaluation of the existing platforms for combatting human trafficking for labour exploitation is demonstrated by the fact that not only is it increasing – the UNODC Global Report states that one victim out of three detected globally are victims of labour exploitation – but in many countries it is now the predominant form of human trafficking.<sup>5</sup>

The aim of this introductory chapter is to present an initial exploration of the topic of the thesis, namely the conceptualisation of labour exploitation in criminal law both in the context of trafficking in human beings and the existing standalone offences. Section 1 discusses the object of enquiry with a presentation of the problem and the research question. Section 2 is devoted to the presentation of the broader research context. Section 3 presents general methodological considerations. Section 4 discusses the added value of the research to wider scholarship and Section 5 outlines the structure of the research.

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<sup>5</sup> UNODC (2018), *supra* n.4, p. 29; Council of Europe (2018), *supra* n.3, p. 6.

## **1. The object of enquiry: the lack of a definition of labour exploitation in human trafficking law**

In 1994 Hill wrote that ‘no clearly defined necessary and sufficient conditions govern the application of the concept of exploitation’ in law.<sup>6</sup> The situation remains unchanged. Thus, the international community’s increased emphasis on tackling human trafficking for labour exploitation requires further investigation as to how effective anti-trafficking measures are in practice. In particular, human trafficking for labour exploitation poses particular problems as a number of challenges have emerged that put into question the sustainability of efforts to tackle the phenomenon as will be discussed in detail in Chapter 1 (Section 2). These challenges emanate from the ‘differences [...] in practice in the interpretation and application of labour standards and in defining labour exploitation.’<sup>7</sup> As such, the articulation of a legal conceptualisation of labour exploitation is the focus of this thesis. More specifically, the principal object of enquiry is the lack of a definition of labour exploitation in human trafficking. This section will briefly outline the problem definition and the research question.

### **1.1 The problem definition**

The international law human trafficking definition presents a non-exhaustive list of forms of exploitation that “at a minimum” amount to labour exploitation: forced labour or services, slavery or practices similar to slavery and servitude.<sup>8</sup> A paradox emerges here, as the aforementioned enumerated prohibited forms of labour exploitation *are* defined in international law, however the exact scope of labour exploitation in the context of human trafficking remains uncertain and has led to an unharmonised application of the offence in national legal orders.<sup>9</sup>

The ambiguous nature of the international human trafficking definition is not a new phenomenon in the context of transnational criminal law. The creation of

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<sup>6</sup> Hill, J., ‘Exploitation’, (1994) *Cornell Law Review* 79, 631, p. 635.

<sup>7</sup> Council of Europe (2018), *supra* n.3, p.32.

<sup>8</sup> Article 4, Council of Europe Convention on Action against Trafficking in Human Beings (2005), Article 2, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15.4.2011, p. 1–11. NB this thesis will situate the discussion in the context of European anti-trafficking law that has adopted the international definition of human trafficking proscribed in Article 3 of the Palermo Protocol.

<sup>9</sup> Council of Europe (2018), *supra* n.3, p.34-35.

international crimes and their subsequent incorporation into national legal orders is characterised by the creation of a double layered structure of domestic criminal offences and international offences. The conceptualisation of this double layered structure is a major challenge for scholars working on international and transnational criminal law.<sup>10</sup> In the context of human trafficking, one concrete implication of the ambiguous definition is that ‘restrictive interpretations by courts of what constitutes human trafficking for the purpose of labour exploitation may result in acquittals or the cases being considered as labour law violations or exploitation which does not involve human trafficking.’<sup>11</sup> Another concern arises from the fact that the circumstances surrounding situations of labour exploitation are extremely complex making identification difficult. For example, exploitation may occur in legitimate economic sectors and workers may appear to tacitly accept or tolerate exploitative working conditions. Furthermore, where individuals are subject to bad working conditions that do not necessarily meet the legal threshold of trafficking it may be difficult to address borderline cases. The UNODC highlighted that the failure to identify human trafficking for the purpose of labour exploitation can result in highly exploitative conduct being addressed as an administrative offence or even going unpunished.<sup>12</sup> Following this line of argument, Mantouvalou posits that the narrow focus on ‘extreme forms of exploitation legitimates unfair treatment at work and obscures the moral wrong of exploitation.’<sup>13</sup> Indeed, we see the non-engagement with exploitation in law as permitting legal structures to be implicit in creating vulnerability and fostering exploitation, which has, quite rightly, led to Mantouvalou’s call for the concept of exploitation to be revisited.<sup>14</sup>

Whilst we acknowledge the need for broader engagement with the concept of structural accounts of exploitation,<sup>15</sup> our focus here will remain on the narrow setting of the criminal law, where the prohibition of exploitation tackles relational accounts of

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<sup>10</sup> Duff, R.A., Farmer, L., Marshall, S.E., Renzo, M. & Tadros, V. (eds) *Criminalisation: the political morality of the criminal law*, (Oxford University Press, 2015), p. 16.

<sup>11</sup> Council of Europe (2018), supra n.3, p.34-35.

<sup>12</sup> UNODC, *Issue paper, The International Legal Definition of Trafficking in Persons: Consolidation of research findings and reflection on issues raised*, (Vienna: United Nations, 2018), p. 26

<sup>13</sup> Mantouvalou V., ‘Legal construction of structures of exploitation’ in Collins, H., Lester, G., & Mantouvalou V., (eds) *Philosophical Foundations of Labour Law*, (Oxford University Press, 2018), p. 188.

<sup>14</sup> Mantouvalou, V., ‘The Right to Non-Exploitative Work,’ in Mantouvalou V., (ed.) *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing, 2015); Mantouvalou, V., (2018), supra n. 13.

<sup>15</sup> Structural exploitation is a property of institutions or systems in which the “rules of the game” unfairly benefit one group of people to the detriment of another see Zwolinski, M., & Wertheimer, A., *Exploitation*, Stanford Encyclopedia of Philosophy (first published 2001, revised 2016).

Structural exploitation is discussed by Zwolinski, M., ‘Structural Exploitation’, (2011) *Social Philosophy and Policy* 29(1), 154-179. p159; Wolff, J., ‘Structures of exploitation’ in Collins, H., Lester, G., & Mantouvalou V., (eds) *Philosophical Foundations of Labour Law*, (Oxford University Press, 2018); Mantouvalou, V., (2018), supra n. 13.

exploitation,<sup>16</sup> as we contend that there is still a lot to be done in this area. For instance, national criminal legal frameworks have failed to embed even the most serious forms of exploitation,<sup>17</sup> and those that have are still grappling with a novel area of criminal law in its embryonic phases of implementation in domestic contexts.

The contemporary framing of the aforementioned forms of labour exploitation as “modern slavery”, in both academic and populist discourse, has led to further confusion and conflation in legal terms. The jurisprudence of the European Court of Human Rights exemplifies this situation wherein the Court held that human trafficking falls within the scope of Article 4 of the European Convention for the protection of Fundamental Rights and Freedoms, 1950 (ECHR) without providing further interpretative clarity of the prohibited practices that are listed in the provision. This begs the question: does such an omission conflate and equate human trafficking with these practices, effectively rendering human trafficking equivalent to slavery?<sup>18</sup>

To investigate this conundrum further, it is important to interrogate the extent to which the focus on human trafficking and “modern slavery” has hindered the full understanding and implementation of legal frameworks that effectively combat labour exploitation in general and fail to protect those who are subject to exploitative working practices, regardless of whether they are considered to be trafficked persons or not. For scholars and practitioners alike, it is not clear where decent work turns into a form of exploitation.<sup>19</sup> One way in which the concept of exploitation can be further clarified is through judicial engagement, however as there has, to date, been limited caselaw, the exact parameters of the nature of exploitation and the threshold between bad working conditions and labour exploitation remain unclear.<sup>20</sup> The persisting ambiguities in the

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<sup>16</sup> Relational exploitation is a property of a discrete transaction between two or more individuals see Zwolinski, M., & Wertheimer, A., (2001) *supra* n.15. Also known as interpersonal exploitation, transactional exploitation, interrelational exploitation, opportunistic exploitation.

<sup>17</sup> UNODC, *Issue Paper: The Concept of "Exploitation" in the Trafficking in Persons Protocol* (New York: United Nations, 2015); European Commission, *Study on case-law relating to trafficking in human beings for labour exploitation Final report* (2015); European Union Agency for Fundamental Rights, *Severe labour exploitation: workers moving within or into the European Union States' obligations and victims' rights*, June 2015.

<sup>18</sup> *Rantsev v. Cyprus and Russia*, 7 January 2010, Application No. 25965/04.

<sup>19</sup> Rijken, C., ‘Trafficking in human beings for labour exploitation: cooperation in an integrated approach’, (2013) *European Journal of Crime, Criminal Law and Criminal Justice* 21, 9-35, p. 12; Skrivankova, K., *Between decent work and forced labour: examining the continuum of exploitation*, JRF programme paper (November 2010), p. 16. O’Connell Davidson, J., ‘New Slavery, Old Binaries: Human Trafficking and the Borders of ‘freedom,’” (2010) *Global Networks* 10(2), 244–61, p. 252.

<sup>20</sup> Shamir, H., ‘A labor paradigm for human trafficking’, (2012) *UCLA Law Review* 60, 76 – 136, p. 85-86; Stoyanova, V., ‘Dancing on the Borders of Article 4: Human trafficking and the European Court of Human Rights in the Rantsev case’ (2012) *Netherlands Quarterly of Human Rights* 30(2), 163-194, p. 185; Gallagher, A., ‘The International Legal Definition of “Trafficking in Persons”: Scope and Application’ in Kotiswaran, P., (ed.) *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, (Cambridge: Cambridge University Press, 2017).

definition are complicating the efforts of States to prosecute human trafficking,<sup>21</sup> as a recent study by Scarpa concluded: definitional ambiguity ‘increases the complexity of the trafficking framework and dilutes its consistency.’<sup>22</sup>

With this in mind, we suggest that a conceptualisation of exploitation in law is key to distinguishing between labour exploitation and poor working conditions. Such an exercise will ensure that criminal law as the most severe form of punishment is applied in a proportionate manner (principle of ultima ratio) and only applies to the most severe forms of labour exploitation, whereas violations of labour standards would be handled by other areas of law including labour or administrative law.<sup>23</sup>

We note that there is resistance to attempts at clarifying exploitation, particularly with regard to a possible reduction in flexibility, wherein a narrow focus may lead to oversight in certain situations.<sup>24</sup> The necessity of determining the parameters of exploitation is further questioned by Allain. He considers that exploitation is clearly enumerated in law, for instance, the understanding of exploitation in human trafficking as defined in the Palermo Protocol is to be understood with reference to the legal instruments, which define these practices: these legal standards are the pivot.<sup>25</sup> Therefore, in the view of these authors, there is no need to define exploitation in law, as it is categorical rather than definitional and any forms of exploitation that do not reach the threshold of those enumerated practices are in fact violations of international labour standards, as outlined by the ILO.<sup>26</sup> Thereby, in the context of labour exploitation, it is these international labour standards that establish the threshold between exploitative labour and legitimate labour.<sup>27</sup>

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<sup>21</sup> UNODC Issue paper (2018), supra n. 12, p. 23.

<sup>22</sup> For discussion on impact of lack of international standardization of definitions along the lines of the trafficking protocol see Directorate General for External Policies of the Union, *Study on Contemporary forms of slavery*, (December 2018), p.29; UNODC, *Global Report on Trafficking in Persons* (New York: United Nations, 2014), p. 16.

<sup>23</sup> Government of Netherlands, *Team Work! Manual for experts on multidisciplinary cooperation against trafficking in human beings for labour exploitation*, January 2016, p.65.

<sup>24</sup> UNODC (2018), supra n.4, p. 25; Skrivankova, K., ‘Defining exploitation in the context of trafficking – what is a crime and what is not,’ in Piotrowicz, R., Rijken, C., and Uhl, B. H., (eds) *Routledge Handbook of Human Trafficking*, (Routledge, 2017), p.112.

<sup>25</sup> Allain, J., ‘No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol’, (2014) *Albany Government Law Review* 14, 1-22, p. 3.

<sup>26</sup> Allain (2014), supra n.25, p. 3. The ILO has identified four categories of fundamental principles and rights at work: freedom of association and collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation. See ILO, *Declaration on Fundamental Principles and Rights at Work and its Follow-up*, 18 June 1998.

<sup>27</sup> Allain, J., *Slavery in international law of human exploitation and trafficking*, (Leiden: Martinus Nijhoff Publishers, 2013), p. 212.



Nevertheless, ample evidence exists from international and regional research on labour exploitation that law makers, judges, legal professionals and policy makers have a difficulty in applying and understanding ‘the multiplicity of forms of labour exploitation and legal provisions relevant to it.’<sup>28</sup> Gallagher for instance emphasises that practitioners are struggling to distinguish between human trafficking and the various forms of exploitation.<sup>29</sup> Moreover, in the absence of a clear definition of exploitation, it is difficult to draw the line between exploitation in terms of violations of labour rights and extreme exploitation amounting to forced labour, servitude or slavery.<sup>30</sup> We follow this line of reasoning. Clarifying the scope of exploitation is important to ensuring that the identification of potential victims of human trafficking and their access to effective remedies is facilitated by the legal certainty that a clear conceptualisation of the phenomenon would provide, overcoming the difficulties that arise where a workers situation is not deemed serious enough to meet the threshold of human trafficking for labour exploitation.<sup>31</sup>

## 1.2 The research question

The overall objective of the thesis is to legally conceptualise labour exploitation. In effect, *how can labour exploitation be conceptualised in law specifically in the context of human trafficking and should it be established as a standalone criminal offence?*

The route to answer this overarching research question is facilitated by the following subsidiary research questions:

- *What is the current state-of-the-art legal understanding of labour exploitation (namely, human trafficking for labour exploitation, slavery, servitude, practices similar to slavery and forced or compulsory labour) in international and regional law? (Chapters 1-3)*

<sup>28</sup> FRA (2015), supra n.17, p.15; European Commission (2015), supra n.17, p.22 & p. 79. See UNODC, *Global Report on Trafficking in Persons* (Vienna: United Nations, 2016), p. 16.

<sup>29</sup> Gallagher, A., ‘Two Cheers for the Trafficking Protocol’, (2015) *Anti-Trafficking Review* Issue 4, 14—32. See also Directorate-General for External Policies Policy Department (2018), supra n. 22, p.9.

<sup>30</sup> Skrivankova (2010), supra n.19, p. 16. See also Dottridge, M., ‘Trafficked and Exploited: The Urgent Need for Coherence in International Law’, in Kotiswaran, P., (ed.) *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, (Cambridge: Cambridge University Press, 2017), pp. 76-77.

<sup>31</sup> For discussion of *R v N*; *R v LE* (2012) EWCA Crim 189, para 90-9 in the Court of Appeal also brought into question the voluntariness of the appellant - he was untroubled by the conditions or the work see Skrivankova, (2017), supra n.24, K., p.117. Contrast with the Dutch case, where the distinction is to be made between the objective standards, and not the subjectivity or free will of the individual. Hof Aarnem Leeuwarden, 16 march 2017 ECLI; GHARLL 2017: 2189 “Vrijwilligheid en subjectief welbevinden van slachtoffers in uitbuitingszaken is echter niet van belang voor beoordeling van de vraag of die slachtoffers zijn uitgebuit in de zin der wet.” Hoge Raad, 19 March 2019, ECLI:NL:HR:2019:383.

- *What are the obstacles to the legal clarification of labour exploitation? (Chapter 4)*
- *How do exploitation theories conceptualise labour exploitation? (Chapter 5)*
- *What are the conditions of exploitation that emerge from theory? (Chapter 6)*
- *How is labour exploitation substantively and formally criminalised in Belgium and England & Wales? (Chapter 8)*
- *How does the judiciary interpret the material scope of labour exploitation? (Chapters 9 & 10)*
- *How can labour exploitation be conceptualised in criminal law? (Chapters 11 & 12)*

Overall, the thesis seeks to determine whether or not a lack of definition of exploitation has hindered the effective implementation of legal frameworks that seek to combat labour exploitation. We will investigate the extent to which the judicial interpretation of labour exploitation can assist in clarifying the legal concept of labour exploitation primarily in the context of human trafficking but also by extension to instances of labour exploitation that occur outside of the scope of the human trafficking offence and are captured either as an existing standalone criminal offence (i.e. forced labour, slavery or servitude), or indeed as a standalone offence of general exploitation. It is envisaged that the latter offence could be applied not only to situations of exploitation that are not captured as human trafficking due to a lack of constituent elements, but also to situations where exploitation has taken place but does meet the definition of forced labour.<sup>32</sup> This will be a critical point of discussion throughout the thesis, in particular in Chapter 1 when determining the impact of a lack of definition of exploitation and again in concluding chapters. Such an approach seeks to position the phenomenon of exploitation in such a way that provides an understanding that is of utility to legal decision-making and policy. Indeed, recent developments in supranational arenas suggests that such an intellectual, academic engagement with this subject is very timely, since there have been calls for future legal reform that would seek to tackle the problem of human trafficking for the purpose of labour exploitation in order for it to be properly recognised.<sup>33</sup>

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<sup>32</sup> Stoyanova, (2012), supra n. 20, pp. 183-184.

<sup>33</sup> For example, the 2019 Secretary General Report of the Council of Europe recommends a protocol to the Convention on Action against Trafficking in Human Beings and a recent study for the European Parliament suggests the possibility of drafting a new treaty on contemporary forms of slavery, as a way to facilitate conceptual clarification. Council of Europe (2019) supra n.3, p. 29;

## 2. The research context: tackling exploitation in a globalised labour market

As mentioned above, the most recent 2017 ILO global estimate suggests that more people are being subjected to exploitative labour conditions than at any point in history.<sup>34</sup> The global component of human exploitation is further galvanised by the neoliberal tenets of a globalised labour market characterised by free trade, market liberalisation, and deregulation, fiscal austerity and privatisation.<sup>35</sup> Whilst the globalised nature of the labour market is characterised by the unrestricted international exchange of capital and goods and an increase in demand for labour, the supply of such labour has been stunted by restrictions on flows of people, with the movement of people constrained by the limited availability of legal migration channels.<sup>36</sup> Importantly, as Chuang notes, such a labour gap is only set to increase, with ‘labour shortages, skills shortages, and increased tax burdens on the working population.’<sup>37</sup> In short, the need for a supply of labour is inevitable; however mechanisms ‘to facilitate lawful migration have diminished as favoured destination countries tighten their borders.’<sup>38</sup> This leaves migrant workers with very little choice but to submit to exploitative recruitment and labour practices, exacerbating the risk of forced or compulsory labour.<sup>39</sup> It is important to emphasise that the regularity of a person’s migration status does not entirely negate the possibility of being at risk of exploitation, it is also possible for regular migrants to be denied labour and human rights; for example those who are tied to their employer.<sup>40</sup> Nevertheless, it is well-documented that irregular migrants are more vulnerable,<sup>41</sup> as exploiters make ‘instrumental use of precarious immigration status as a tool of coercion and control of exploitation labour relation.’<sup>42</sup>

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Directorate-General for External Policies Policy Department (2018), supra n.22, p.6. See also calls from Ms. Maria Grazia Giammarinaro, UN Special Rapporteur on Trafficking in Persons, especially Women and Children on the need for a broader application of labour exploitation in presentation given at JUSTICE AT LAST - European Action for Compensation for Victims of Crime International Exchange Seminar 27-28 May 2019.

<sup>34</sup> ILO (2017), supra n. 4.

<sup>35</sup> Lewis, H., Dwyer, P., Hodkinson, S., & Waite, L., (eds) *Precarious lives: forced labour, exploitation and asylum*, (Bristol: Policy Press, 2015), p. 19.

<sup>36</sup> Chuang, J., ‘Beyond a snapshot: Preventing human trafficking in the global economy’, (2006) *Indiana Journal of Global Legal Studies* 13(1), 137-163, P. 140.

<sup>37</sup> Chuang (2006), supra n.36, pp. 140 – 144.

<sup>38</sup> Chuang, J., ‘Rescuing trafficking from ideological capture: prostitution reform and anti-trafficking law and policy,’ (2010) *University of Pennsylvania Law Review* 158(6), 1655-1728, p. 1660; Shelley, L., *Human Trafficking: A global perspective*, (Cambridge: Cambridge University Press, 2010), p. 42.

<sup>39</sup> Aronowitz, A., *Human Trafficking, Human Misery: The Global Trade in Human Beings*, (Plymouth: Scarecrow Press Inc., 2013), p. 12; Gallagher, A., ‘Exploitation in migration: unacceptable but inevitable’, (2015) *Journal of International Affairs* 68(2), 55-74, p. 67; Lewis, et al (2015), supra n.35, p. 19.

<sup>40</sup> International Organisation for Migration *Is trafficking in human beings demand driven? A multi-country pilot study*, Anderson, B., & O’Connell Davidson, J., Migration Research Series (2003), p. 8.

<sup>41</sup> Aronowitz (2013), supra n.39, p. 23. Ollus, N., ‘Regulating forced labour and combating human trafficking: the relevance of historical definitions in a contemporary perspective’ (2015) *Crime Law and Social Change* 63(5), 221-246, p. 224.

<sup>42</sup> Lewis et al (2015), supra n. 35, p. 15.

As such, the aforementioned figure of 24.9 million people who are considered to be in a position of forced labour, implicates a wide range of actors and not just States, especially taking into account the increasing prevalence of multinational corporations in global structures of power.<sup>43</sup> Inevitably, human trafficking is one form of illicit enterprise that has profited from the neoliberal state of affairs, with the opportunities offered by the globalised labour market seen as a viable source of potential wealth for those who wish to benefit. Despite the increased emphasis on tackling human trafficking, regulatory efforts to respond to labour exploitation have been limited to relational forms of exploitation that are characterised by the intentional exploitation of another, rather than the structural processes, such as the globalised labour market, that exacerbate and in some instances create exploitation.<sup>44</sup> O'Connell Davidson & Quirk have on many occasions made note of the extent to which exploitation is being tolerated, with an emphasis on the 'politics of exception'<sup>45</sup> or 'depoliticisation of extreme exploitation',<sup>46</sup> that has a 'self-serving effect of concealing large parts of exploitation.'<sup>47</sup> With this in mind, any efforts made to further conceptualise labour exploitation in law must also seek to be applicable to the broader context of both structural and relational exploitation, hopefully to the benefit of future regulatory efforts. In order for such efforts to be effective, they must exercise caution, however, as already, the narrow concept of the term exploitation is overused not only when referring to the most extreme cases but also when addressing transactions that leads to an imbalanced outcome.<sup>48</sup> As noted by Sample, this is a slippery slope as 'not all transactions involving unequally divided benefits are exploitative or morally

<sup>43</sup> Dahan, Y., Lerner, H., Milma-Sivan, F., 'Global labor rights as duties of justice', in Dahan, Y., Lerner, H., Milma-Sivan, F., (eds) *Global Justice and International Labour Rights* (Cambridge University Press, 2016), p.70-77.

<sup>44</sup> Mantouvalou (2018), supra n.13 p. 188; Wolff (2018), supra n.15, p.178 & p.183. Gebrewold, B., 'Human Trafficking and Structural Violence' in Gebrewold, B., Kostenzer, J., & Müller, A. T., *Human trafficking and exploitation: Lessons from Europe*, (Routledge, 2017). Goodin, R., 'Exploiting a situation and exploiting a person', Reeve, S., (ed.) *Modern Theories of exploitation* (Sage Publishing, 1987), p.26; See Muller re the requirement for criminal offences under Article 3 of the Palermo Protocol to be committed intentionally Müller, A.T., 'The Promise and Pitfalls of Criminalizing Trafficking in Persons at the International Level. An Analysis from the Perspective of International and European Criminal Law' in Gebrewold, B., Kostenzer, J., & Müller, A. T., (eds) *Human trafficking and exploitation: Lessons from Europe*, (Routledge, 2017), p.49-53. For discussion on shift to structural contributors to human trafficking phenomenon see Chuang, J., 'Contemporary Debt Bondage, "Self-Exploitation," and the Limits of the Trafficking Definition', in Kotiswaran, P., (ed.) *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, (Cambridge University Press, 2017), p.113 For discussion on the role of state immigration regimes on perpetuating exploitation see O'Connell Davidson, J., 'The Right to Locomotion? Trafficking, Slavery and the State', in Kotiswaran, P., (ed.) *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, (Cambridge: Cambridge University Press, 2017), p.166-168.

<sup>45</sup> Quirk, J. & Bunting, A., 'The Politics of Exception: the Bipartisan Appeal of Human Trafficking' in Quirk, J., & O'Connell Davidson, J., (eds) *E-Book on Popular and Political Representations* (Open Democracy Series, 2016).

<sup>46</sup> O'Connell Davidson (2010), supra n.19, pp. 244-261.

<sup>47</sup> Quirk, J. & O'Connell Davidson, J., 'Introduction' in Quirk, J., & O'Connell Davidson, J., (eds) *E-Book on Popular and Political Representations*, (Open Democracy Series, 2016).

<sup>48</sup> Wolff (2018), supra n.15, p. 175.

objectionable’<sup>49</sup> and exploitation can lose its significance when it is insufficiently understood and improperly employed.

### 3. Methodology

*The meaning of concepts [...] is grounded by the overall structure of theories in which they are embedded. They cannot be understood apart from the discursive space they occupy in relation to other concepts.*<sup>50</sup>

The above citation by Brewer clearly signifies the rationale for the adoption of a mixed methods approach in the present thesis: i) legal positivist analysis and ii) exploratory theoretical analysis. Legal positivism is understood as the description and explanation of the law as it is, including the analysis of legal texts to determine their meaning. It is a suited method of analysis in the present thesis, as we seek to systematise legal norms, by analysing the outputs of the courts and checking for coherence and accuracy in their application of legal sources.

The *legal positivist analysis* is twofold. The first stage consists of an expository review of the international and regional laws that prohibit labour exploitation (Part I). The second stage entails a qualitative comparative analysis of two national legal orders by way of analysis of the legislation and a file study on criminal cases to examine the domestic implementation of the international prohibition of labour exploitation, both in terms of formal and substantive law (Part III).<sup>51</sup> The *explorative theoretical analysis* complements the two stages of the legal analysis process by adopting an explorative approach to the existing understanding of exploitation in political theory (Part II). The exploratory analysis of the political theory on exploitation seeks to provide information so as to further develop the legal analysis and ensure that the research is normatively grounded.

The mixed method approach is applicable in the context of research on labour exploitation because it not only acknowledges the increasing permeability of domestic

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<sup>49</sup> Sample, R., *Exploitation: What it is and why it's wrong*, (New York: Rowman and Littlefield Publishers, 2003), p. 1.

<sup>50</sup> Brewer, J., ‘The Scottish Enlightenment’, in Reeve, S., (ed) *Modern Theories of exploitation* (Sage Publishing, 1987), p. 12-13.

<sup>51</sup> Hervey, T., Cryer, R., Sokhi-Bulley, B., Bohm, A., *Research Methodologies in EU and International Law*, (Hart, 2011), p.38.

legal systems to external regulatory efforts but also the role of legal orders in handling moral issues.<sup>52</sup> Indeed, at both stages of analysis of the law in action, an awareness of the surrounding contextual factors that may influence the outcome and decision making of those who interpret, reform, and implement the law is required.<sup>53</sup> The multi-disciplinary engagement with political theory permits a holistic contextualised understanding of the functioning of the law, achieved by not only taking account of legislative rules, judicial decisions, the ‘law in the books’, but also, in fact, everything that helps to understand human conduct in the situation under consideration.<sup>54</sup> Similarly, a contextualised approach recognises that the domestic implementation of supranational legal standards requires equivalence functionalism rather than unification. This is of relevance to the present thesis and the comparison of two national legal orders that are subject to EU Law where, as Michaels reminds us, the principle of mutual recognition requires equivalence not similarity.<sup>55</sup>

International and regional legal standards do not require domestic jurisdictions to apply the law word for word. Supranational standards are merely a minimum basis for domestic jurisdictions to apply in their own national legislation, balancing deference to national sovereignty and flexibility for the developing/evolutionary nature of the concept of exploitation, with a need to minimise the risk of ‘a race to the bottom’ by States who seek to pursue their own self-interest.<sup>56</sup> The focus in Part III on two national legal orders will begin to demonstrate an understanding of the elements and indicators that play a role in practice in the application of very different domestic criminal legal frameworks, thus ensuring consistency that will facilitate judicial cooperation and prevent double incrimination.<sup>57</sup> Importantly, Belgium and England & Wales are two Council of Europe member States where labour exploitation has been identified as the

<sup>52</sup> Benvenisti E., & Downs, G. W., ‘National Courts, Domestic Democracy, and the Evolution of International Law’, (2009) *European Journal of International Law* 20(1), 59 – 72, p.60.

Brand, O., ‘Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies,’ 2007 *Brook. Journal of International Law* 32, 405, p. 413; Palmer, V. V., ‘From Lerotholi to Lando: Some Examples of Comparative Law Methodology’, (2005) *American Journal of Comparative Law* 53, 261, p283.

<sup>54</sup> Lomio, J. Paul, et al. *Legal Research Methods in a Modern World: A Coursebook*, (Djøf Forlag, 2011), p. 62. Ewald, W., ‘The Jurisprudential Approach to Comparative Law: A Field Guide to Rats’, (1998) *American Journal of Comparative Law* 46, 701, p.702. Palmer (2005), supra n.52, p288.

<sup>55</sup> Michaels, R., ‘The Functional Method of Comparative Law’, in Reimann M., & Zimmermann, R., (eds) *The Oxford Handbook of Comparative Law* (2<sup>nd</sup> edition), (Oxford University Press: 2019), p. 376-378.

<sup>56</sup> Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, Warsaw, 16.V.2005 (2005); Langille, B., ‘Global justice and the grammar of law,’ in Dahan, Y., Lerner, H., Milma-Sivan, F., (eds) *Global Justice and International Labour Rights* (Cambridge University Press, 2016), p. 201.

<sup>57</sup> Article 83 TFEU Harmonisation of substantive criminal law, Huberts, C., ‘Les innovations de la loi du 10 août 2005 modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains et contre les pratiques des marchands de sommeil’, (2006) *Journal du Droit des Jeunes* n°251, 6-22, p. 22; see Müller (2017), supra n. 44, p56. For example, like Belgium, the Netherlands has no standalone offences, which calls for concern over the lack of alternatives where there is not sufficient evidence of trafficking. European Agency for Fundamental Rights (2015), supra n. 17, p.39.

predominant form of trafficking.<sup>58</sup> With this in mind, a number of criteria explains the choice of case studies:

- i) Belgium has a civil law system whereby in complex criminal cases an examining judge [*juge d'instruction*] may direct the investigation and deal with pre-trial matters, whereas England & Wales' common law system has a judge led pre-trial hearing, the trial itself involves a jury with the role of the judge being to provide legal directions. Thus, there is a distinction in the role of the judge in the substantive criminalisation of labour exploitation;
- ii) In addition to human trafficking for the purposes of labour exploitation, three standalone offences of slavery, servitude and forced or compulsory labour are criminalised in England & Wales. By contrast, in Belgium the only relevant offence is human trafficking for economic exploitation, notwithstanding the existence of a Social Criminal Code prohibiting certain labour market violations;
- iii) Labour exploitation in the human trafficking offence is broadly understood in Belgium, whereas in England & Wales, the offence must involve an action of arranging or facilitating travel, limiting the scope of its application;
- iv) The physical access to judgments in both countries are in languages that are consistent with the linguistic capabilities of the researcher. As we will explain in Chapter 7, the file study in Belgium is restricted to francophone cases only.

Finally, the two national legal orders are representative of two influential domestic policy approaches in terms of the regional and international purview of the prohibition of labour exploitation. Belgian practitioners highlight the influential role of existing domestic law in the development of the EU legal framework that we will discuss in Chapter 1, which culminated in the Directive 2011/36/EU and two additional forms of exploitation in the EU definition of trafficking, i.e. forced begging and exploitation of forced criminality. These two purposes of exploitation have been present in Belgian legislation since 2005.<sup>59</sup> Similarly, the UK government's engagement in

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<sup>58</sup> Council of Europe (2018), *supra* n.3, p.38.

<sup>59</sup> The Belgian authorities who held the rotating presidency of the Council of the EU in 2010 also referred to the swift completion of the Directive's negotiations. An agreement among Member States was obtained at the JHA Council of 2 and 3 December 2010 (Doc. 16918/10), and the Parliament approved the text on 14 December 2010 (P7\_TA (2010) 0471, A7-0348/2010), allowing the

modern slavery as a criminal justice priority (despite initial denial of any need for such a law and policy framework) has influenced subsequent domestic legal reform beyond the borders of Europe.<sup>60</sup>

#### 4. The added-value

The present thesis contains original work that will significantly contribute to the field of human trafficking and labour exploitation research, an area which is still lacking despite an increased emphasis on research on this phenomenon in recent years.<sup>61</sup> In particular, the combination of the law and theory on exploitation is unique and ensures a strong normative foundation for its future functionality.

Prosecutions and criminal cases of human trafficking for labour exploitation are rarely subject to expert analysis on the role of courts in interpreting the international definition, as there is a weak evidence base due to a short timeframe in some instances of introduction of the offences in domestic criminal law and consequently the number of cases being ‘thin on the ground.’<sup>62</sup> Therefore, the comparative analysis of the application and interpretation of the substantive criminal law in national legal orders is unique. The judicial interpretation and adjudication of the law is crucial to its effective application and to provide legal certainty and consistency to the national criminal justice policy on combatting human trafficking for labour exploitation.<sup>63</sup> However, to date there have been concerns raised as to the domestic courts failure to fully understand the gravity of labour exploitation or the nexus with human trafficking.<sup>64</sup> One of the main reasons for this is that there has been very few cases to handle what is understood to be a particularly “novel” area of law. As a result, there is a limited understanding of

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adoption of the Directive by the Council on 21 March 2011. For more details about the role of Belgium in the development of the EU Area of Freedom, Security and Justice, see Weyembergh, A., & Brière, C., ‘La Belgique: moteur de l’espace européen de justice pénale?’, (2013) *Revue des affaires européennes*, 105, p. 105. Huberts, C., & Minet, J.-F., ‘La loi du 29 avril 2013 visant à modifier l’article 433quinquies du Code pénal en vue de clarifier et d’étendre la définition de la traite des êtres humains: analyse et mise en perspective’ (2014) *Revue de Droit Pénal de de Criminologie*, 34, p. 6 – 7.

<sup>60</sup> Theresa May brought the issue to the fore in a speech at the United Nations General Assembly in September 2017 that was followed by an adoption of a ‘Political Declaration to on the Implementation of the United Nations Global Action Plan to Combat Trafficking in Persons’ on 27 September 2017 (UN/GA/ 11995).

The drafting and implementation of the Australian Modern Slavery Act 2018 was heavily influenced by the legislative developments in the UK.

<sup>61</sup> Council of Europe (2018), supra n. 3, pp.39-41.

<sup>62</sup> Gallagher, A., ‘Editorial: The Problems and Prospects of Trafficking Prosecutions: Ending impunity and securing justice’, (2016) *Anti-trafficking Review* Issue 6, 1-5, pp. 4-5. Esser, L.B., & Dettmeijer-Vermeulen, C.E., ‘The Prominent Role of National Judges in Interpreting the International Definition of Human Trafficking’ (2016) *Anti-trafficking Review*, Issue 6, 91-105, p. 91.

<sup>63</sup> Müller (2107), supra n. 44, p58.

<sup>64</sup> On this point see the discussion of the role of the Greek courts in ECHR case of *Chowdury* in Council of Europe (2018), supra n.3, p. 6.



what constitutes trafficking for forced labour and the meaning and scope of exploitation.<sup>65</sup> We note that research conducted by the European Commission reveals that the scope of the meaning of forced labour, and in some instances a restrictive interpretation by courts, can lead to acquittals or cases being prosecuted under alternative offence provisions.<sup>66</sup>

The importance of deciphering the judicial understanding of labour exploitation will improve prosecutions and effective investigations,<sup>67</sup> in particular by ensuring improved identification of victims (who do not always perceive themselves as victims or do not trust authorities due to their irregular migration status) and improved access to legal redress and compensation.<sup>68</sup> Furthermore, it will contribute to addressing the knowledge gap when it comes to identifying this form of exploitation amongst professionals. For example, law enforcement authorities do not always recognise potential victims of human trafficking when they complain of non-payment of wages, as such a violation is not seen as a criminal matter but as a civil matter.<sup>69</sup> A better understanding of exploitation will also contribute to ensuring that victims' rights are implemented. For instance, as noted by Burland, recognition of the compulsion to criminal activity as a *modus operandi* of traffickers, will ensure adherence to the principle of non-prosecution of victims, recognising them as victims of trafficking and not perpetrators.<sup>70</sup>

Finally, in recognition of the fact that a criminal justice response does not address the structural factors that contribute to exploitation, namely, poor protection of worker's rights, increased risk to exploitation in certain sectors, restrictive migration regimes, and lack of regulation of labour market compliance; we contend that the conceptualisation of exploitation, as it is grounded in both theory and practice, provides a normative basis upon which the legal reconceptualisation can also address the

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<sup>65</sup> See examples of Cyprus where coercion is not recognised, UK where reference is made to the uneven knowledge amongst judges and the emphasis on irregular migration status and France where GRETA highlights the prosecution of victims of trafficking as offenders in Council of Europe (2018), *supra* n.3, pp.65-66.

<sup>66</sup> European Commission (2015), *supra* n. 17.

<sup>67</sup> European Commission (2015), *supra* n. 17; Gallagher (2016) *supra* n.62, p. 8.

<sup>68</sup> See examples of Belgium where the possibility for increased compensation was introduced and UK where contradictory legislation effectively criminalises trafficking victims, as a result of the entry into force of the new offence of illegal working in the Immigration Act 2016 in Council of Europe (2018), *supra* n. 3, pp.59-66.

<sup>69</sup> See example of UK and reports received from civil society of law enforcement failing to identify potential victims of trafficking in Council of Europe (2018), *supra* n. 3, p.59.

<sup>70</sup> Burland, P., 'Still punishing the wrong people: the criminalisation of potential trafficked cannabis gardeners', in Craig, G., Balch, A., Lewis, H., & Waite, L., (eds) *Modern slavery agenda: policy, politics and practice in the UK* (Policy press, 2019), p. 173.

structural injustices that create exploitation. Whilst the focus in the present thesis remains on clarification of exploitation in the criminal legal sphere, such a process can assist beyond the context of the criminal law, in determining policy and legal measures that will regulate and address labour exploitation that is ‘below the line,’<sup>71</sup> recognising an understanding of exploitation that is integral to wider economic systems, including labour markets, migration governance and global inequalities.<sup>72</sup>

## 5. Structure

Bearing in mind the overall purpose and object of enquiry of the thesis and the subsidiary research questions; the structure of the thesis not only depicts a cross-disciplinary exploration of law and political theory, but also interacts with supranational and national legal spaces in order to arrive at a scientifically robust response to the main research question.

### **PART I – State-of-the-art understanding of labour exploitation in international and regional law**

Part I investigates the impact of the lack of a definition of exploitation in international and regional law by adopting an expository review of the prohibited forms of labour exploitation, namely human trafficking for the purpose of labour exploitation (Chapter 1), slavery and servitude (Chapter 2) and forced or compulsory labour (Chapter 3). Each chapter considers the judicial interpretation of these prohibited forms and identifies the legal lacunas that emerge from the lack of clarification of their material scope. Chapter 4 takes stock of the state-of-the-art analysis by preliminarily identifying the elements of exploitation that emerge from the prohibited forms of labour exploitation and discusses the legal, moral and political obstacles to the legal clarification of labour exploitation.<sup>73</sup>

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<sup>71</sup> Balch, A., ‘Defeating ‘modern slavery’, reducing exploitation? The organisational and regulatory challenge?’, in Craig, G., Balch, A., Lewis, H., & Waite, L., (eds) *Modern slavery agenda: policy, politics and practice in the UK*, (Policy press, 2019), p. 91.

<sup>72</sup> Lewis, H., & Waite, L., ‘Migrant illegality, slavery and exploitative work,’ in Craig, G., Balch, A., Lewis, H., & Waite, L., (eds) *Modern slavery agenda: policy, politics and practice in the UK* (Policy press, 2019), p. 219.

<sup>73</sup> Hervey et al (2011), *supra* n. 51, p.9.

## **PART II – Exploitation and its main elements in political theory**

Part II of the thesis shifts away from law and explores exploitation in political theory, with a view to identifying those features that can be of relevance to the legal understanding of exploitation. Cross-fertilisation of disciplines ensures that the normative sources that form the basis of the “external” morality of the law are identified.<sup>74</sup> The exploratory analysis of exploitation in political theory in Chapter 5 provides the normative basis for a typology of exploitation and the development of a theoretical model that identifies the conditions of exploitation in Chapter 6.

## **PART III – Labour exploitation in the criminal law of Belgium and England & Wales**

Part III problematises the lack of a definition of exploitation in law by analysing how national legal orders domestically implement the supranational legal framework prohibiting labour exploitation. Overall, the analysis compares two national legal orders: Belgium and England & Wales. Following a brief overview of the composition of the file study and the contextualisation of the two comparison countries in Chapter 7, the comparative legal analysis is three-fold. First, Chapter 8 considers the formal and substantive criminalisation of labour exploitation in the national legal frameworks by reviewing the ingredients of the offences and how they have been understood in practice. Secondly, we will consider the judicial interpretation of the material scope of labour exploitation and taking into account the conditions of exploitation in theory, assess the extent to which the judiciary’s interpretation aligns with the understanding of exploitation that emerged from the legal and theoretical analysis in Parts I and II (Chapter 9). Finally, we will discuss how the judiciary qualify exploitation by using indicators as part of their assessment of the existence (nature) and severity (degree) of exploitation (Chapter 10). The focus on the judiciary in this Part highlights the role of the judge as being at the forefront of legal developments since judicial precedent is generally regarded as binding on future decisions.<sup>75</sup>

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<sup>74</sup> Langille (2016), *supra* n. 56, p. 194.

<sup>75</sup> Du Plessis, J., ‘Comparative Law and the Study of Mixed Legal Systems’, in Reimann M., & Zimmermann, R., (eds) *The Oxford Handbook of Comparative Law* (2<sup>nd</sup> edition), (Oxford University Press: 2019), p 479.

## **PART IV – Towards a legal conceptualisation of labour exploitation**

Bearing in mind the main research question of this thesis - *how can labour exploitation be conceptualised in law specifically in the context of human trafficking and should it be established as a standalone criminal offence?* - Chapter 11 draws upon the analysis of labour exploitation in law and theory and its domestic prohibition in two national legal orders with a view to conceptualising labour exploitation in human trafficking law and as a standalone offence. Chapter 12 deliberates on six reflections that need to be considered when applying the proposed conceptualisation of labour exploitation in law.



**PART I - State-of-the-art understanding of labour exploitation in  
international and regional law**



## **CHAPTER 1 – State-of-the-art legal understanding of human trafficking for the purpose of labour exploitation**

### **0. Introduction and structure of the chapter**

Overall this chapter aims to introduce the current legal understanding of labour exploitation in the human trafficking law and policy framework. Section 1 outlines the international and regional legal instruments that have dealt with human trafficking following the entry into force of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, 2000 which promulgated an internationally accepted definition of trafficking in persons (Article 3) – hereinafter the Palermo Protocol. As seen in the introduction, the definition of human trafficking contains three constituent elements that must be identified to meet the legal threshold of the offence: the action, the means, and the purpose of exploitation. The object of enquiry in the present thesis is the third element: the purpose of exploitation. It is contended that the non-exhaustive list of forms of exploitation in the 2000 Palermo Protocol perpetuates a categorical as opposed to a definitive understanding of exploitation.

Since exploitation is not defined in the Palermo Protocol, Section 2 explores the impact of the lack of a legal definition of exploitation on the effective implementation of the human trafficking prohibition. Whilst it is accepted that the non-exhaustive



categorical list of forms of exploitation constituting the purpose element of the human trafficking offence in the Palermo Protocol is to be viewed as a minimum standard that permits flexibility to States when dealing with human trafficking domestically, a number of difficulties have been identified that stifle the effective tackling of the transnational phenomenon. In particular, four problems arise from the lack of a definition of exploitation in human trafficking law: a **conflation and confusion in terminology** (Section 2.1) fosters a **stereotypical understanding** of labour exploitation (Section 2.2) and **fragmented and inconsistent** domestic implementation (Section 2.3) that perpetuates **legal uncertainty** (Section 2.4).

Section 3 introduces **the crucial role that the judiciary plays** in determining the parameters of a concept that is not defined in law. An analysis of the case law of the European Court of Human Rights highlights the impact of a lack of a definition of exploitation. The case law reveals a **conflation of human trafficking** with other forms of exploitation, the **lack of understanding of the complexities of the human trafficking** offence and **the need to give the forms of exploitation listed in the purpose element as standalone offences a separate handling in law**, so that when the action and means elements of human trafficking are not present, the situations can be attributed to other forms of exploitation.

## 1. Labour exploitation in international and regional legal definitions of human trafficking

Historically, the international understanding of exploitation in human trafficking law was restricted to instances of sexual exploitation, or the white slave trade.<sup>1</sup> In 2000, the transnational crime of human trafficking was defined in one of three Additional

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<sup>1</sup> *International Agreement for the Suppression of White Slave Traffic* (1904) Paris, 18 May 1904, 1 LNTS 83, entered into force on 18 July 1905, amended by a Protocol approved by the UN General Assembly on 3 December 1948, UNTS, Vol. 30, p. 23; League of Nations, *Convention for the Suppression of Traffic in Women and Children*, 30 September 1921, 9 LNTS 415; League of Nations, *Convention for the Suppression of the Traffic in Women of Full Age*, 11 October 1933, 150 LNTS 431; UN General Assembly, *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 2 December 1949, A/RES/317, UNTS, Vol. 96, p. 271; UN General Assembly, *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, Geneva, 7 September 1956, UNTS, vol. 266, p. 3; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, UNTS, vol. 999, p. 171; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, UNTS, vol. 993, p. 3; UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, UNTS, vol. 1249, p. 13.

See Chuang, J., 'Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts', (1998) *Harvard Human Rights Journal* 11, 65, pp. 73-78; Allain, J., *Slavery in international law of human exploitation and trafficking*, (Leiden: Martinus Nijhoff Publishers, 2013), p.340; Ollus, N., 'Regulating forced labour and combating human trafficking: the relevance of historical definitions in a contemporary perspective' (2015) *Crime Law and Social Change* 63(5), 221-246, p. 222.

Protocols to the United Nations Convention against Transnational Organized Crime. The entry into force of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000 (hereinafter the Palermo Protocol) is considered as a ‘watershed in galvanising the global movement against trafficking’<sup>2</sup> as it not only addresses gaps in existing legal frameworks<sup>3</sup> but also includes a ‘universally accepted’<sup>4</sup> definition:

*Article 3(a). Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. **Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs** [emphasis added].<sup>5</sup>*

The definition consists of three constituent elements that must all be present for a situation to constitute trafficking in persons under international law: (i) an action; (ii) a means by which that action is achieved (except where the victim is a child; it is not necessary to prove that one of the acts was accomplished through the use of any of the listed means<sup>6</sup>); and (iii) a purpose of exploitation. Whilst it is acknowledged that exploitation is *dol specialis* requiring evidence of an action and means for the ‘purpose of exploitation’, a recent UNODC Issue Paper on the international definition of human trafficking notes that in practice, the existence of exploitative situations trigger investigations and constitute the ‘most compelling evidence of intention to exploit.’<sup>7</sup> Thus, in practice, the application of the exploitation element is of great value to the

<sup>2</sup> Ezeilo, J., ‘Achievement of the Trafficking Protocol: Perspectives from the former UN Special Rapporteur on Trafficking in Persons’, (2015) *Anti-trafficking review* 4, 144-149, p.144.

<sup>3</sup> van der Wilt, H., ‘Trafficking in human beings, enslavement, crimes against humanity: Unravelling the concepts’ (2014) *Chinese Journal of International law* 13, 297-334, p. 301.

<sup>4</sup> Ezeilo (2015), *supra* n.2, p.145.

<sup>5</sup> Article 3 United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime*, New York, 15 November 2000, UNTS, vol. 2237, p. 319, Doc. A/55/383.

<sup>6</sup> Article 3(c), *Ibid*.

<sup>7</sup> UNODC, *Issue paper, The International Legal Definition of Trafficking in Persons: Consolidation of research findings and reflection on issues raised*, (Vienna: United Nations, 2018), p. 17.

identification of human trafficking, reinforcing the importance of clarifying its legal meaning. We will further develop this point in the forthcoming chapters that highlight the relevance of de facto exploitation (Chapters 2 & 4) and its role in determining the existence of the offence (Chapter 9).

Article 3(a) of the Palermo Protocol extends the scope of the purpose element. The element is no longer restricted to the sexual exploitation of women and children,<sup>8</sup> but instead posits a categorical, non-exhaustive list of forms that amount to the *minimum* basis for the types of exploitation to be considered serious enough, when combined with the constituent elements of action and means, to constitute the crime of human trafficking. For the purpose of the expository review of labour exploitation in law in the remainder of Part I, the following forms of labour exploitation that are listed in the international definition are the principle focus of enquiry: slavery or practices similar to slavery, servitude (Chapter 2) and forced or compulsory labour (Chapter 3).

Crucially, the Palermo Protocol does not define exploitation. Therefore, and bearing in mind the overall purpose of this thesis, the present chapter explores the promulgation of the categorical manifestation of the purpose element in the human trafficking definition and, in particular, the representation of labour exploitation.

Despite the lack of a definition of exploitation in the Palermo Protocol, many authors, including Chuang, Edwards, Shelley and Rittich, believe that the extension of the purpose element of human trafficking beyond sexual exploitation has triggered a shift towards a broader understanding of exploitation and recognition of the exploitation phase as being fundamental to the trafficking experience.<sup>9</sup> Chuang critiqued the previous anti-trafficking legal framework for being ‘illusory and

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<sup>8</sup> Supra n.1.

<sup>9</sup> For further discussion and examples of the expansion of the definition see Edwards, A., ‘Trafficking in human beings: At the intersection of criminal justice, human rights, asylum/migration and labor’, (2007-2008) *Denver Journal of International Law and Policy* 36, 9-53, p. 14.

For discussion on exploitation as key element of offence see Shelley, L., *Human Trafficking: A global perspective*, (Cambridge: Cambridge University Press, 2010), p. 11. UNODC Issue paper (2018), supra n.7, p.14; Rittich, K., ‘Representing, Counting, Valuing: Managing Definitional Uncertainty in the Law of Trafficking’, in Kotiswaran, P., (ed.) *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, (Cambridge: Cambridge University Press, 2017), p247; Chuang, J., ‘Contemporary Debt Bondage, “Self-Exploitation,” and the Limits of the Trafficking Definition’, in Kotiswaran, P., (ed.) *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, (Cambridge: Cambridge University Press, 2017), p.118. See regional and international policy reports that recognise emphasis on exploitation element in the international definition in Directorate-General Justice, Freedom and Security, *Report of the Experts Group on Trafficking in Human Beings*. Brussels, Directorate-General Justice, Freedom and Security (Brussels, 22 December 2004), p.53; ILO, *Report I(B), A global alliance against forced labour Report of the Director General, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2005*, International Labour Conference, 93rd Session, Geneva, 2005, p. 7.

ineffective’<sup>10</sup> as it failed to take into account the complexity of exploitation. For instance, individuals who were vulnerable to trafficking but not sexually exploited were not included in the scope of human trafficking. With this in mind, it is important to note that whilst the international definition emphasises the fundamental nature of the exploitation element, not all exploitation amounts to human trafficking. Indeed, when clarifying the interpretation of the definition, the aforementioned UNODC Issue Paper confirms that exploitation that occurs in the absence of an act and means (just an act for minors), ‘will not constitute trafficking in persons under international law and should be addressed by alternative legislative provisions or approaches.’<sup>11</sup>

Whilst we acknowledge that the extension of the exploitation element in the Palermo Protocol is to be applauded, there is some cause for concern, as the categorical approach to exploitation (resulting in a non-exhaustive list of forms of exploitation), has created definitional uncertainties. The extent to which such uncertainties are due to a lack of elaboration of the exploitation element in favour of the two other constituent elements during the drafting process is contested. Authors such as Kotiswaran and Wijers contend that the means and action elements received far more attention than the exploitation element during the drafting and negotiations of the instrument.<sup>12</sup> However, the UNODC Issue Paper on the international definition refers to the *travaux préparatoires* in order to demonstrate that ‘considerations of exploitation were a central part of the negotiations, not just in terms of the definition but also more broadly in establishing the Trafficking in Persons Protocol’s scope of application.’<sup>13</sup> Indeed, exploration of the *travaux préparatoires* reveals attempts to include and broaden the scope and understanding of labour exploitation in the definition during the drafting process. In particular, the submissions of the UN Special Rapporteur on Violence Against Women and the International Labour Organisation (ILO) sought clarity of the scope of the Protocol and the forms of exploitation it addressed.

The UN Special Rapporteur proposed that ‘the purpose of the protocol should include trafficking of persons into slavery-like conditions, in order to encompass

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<sup>10</sup> Chuang (1998) *supra* n.1, p. 66.

<sup>11</sup> UNODC Issue paper (2018), *supra* n. 7, p.32.

<sup>12</sup> Kotiswaran, P., ‘Protocol at the Crossroads: Rethinking anti-trafficking law from an Indian labour law perspective’ (2015) *Anti-trafficking Review*, issue 4, 33-35 pp. 33-55; Wijers, M., ‘Purity, Victimhood and Agency: Fifteen years of the UN Trafficking Protocol, (2015) *Anti-Trafficking Review*, issue 4, 56-79.

<sup>13</sup> UNODC Issue paper (2018), *supra* n. 7, p.15.

trafficking for domestic work, forced marriages and forced motherhood, which were not traditionally encompassed under the term “forced labour”.<sup>14</sup>

The ILO proposed the deletion of the reference to sexual exploitation and an amendment to include the term ‘trafficking in persons for the purpose of labour exploitation in particular forced labour and serfdom.’<sup>15</sup> Similarly, the UN High Commissioner for Human Rights called for trafficking for labour exploitation to be understood beyond a restrictive approach of trafficking for forced labour, whereby ‘a preferable and more accurate description of purposes would include reference to forced labour and/or bonded labour and/or servitude.’<sup>16</sup>

Ultimately, the subsequent concerns raised by scholars are *prima facie* well founded as, regardless of the efforts made to secure recognition of certain forms of labour exploitation in the definition of trafficking, “labour exploitation” as an exploitative purpose was expressly excluded,<sup>17</sup> whilst the purpose element of the definition clearly includes the rather broad term “other forms of sexual exploitation.”

The *travaux préparatoires* also demonstrate that the inclusion of a non-exhaustive list versus an exhaustive list was a divisive point of discussion.<sup>18</sup> The insertion of the phrase “at a minimum” was intended to allow State parties the possibility to go beyond the offences listed in this definition and to make it possible for the Protocol to cover future forms of exploitation.<sup>19</sup> Indeed, there are some forms of exploitation that were omitted from the Palermo Protocol, but that are now prominent in other legal instruments, such as forced begging and forced criminality.<sup>20</sup> Edwards suggests that their explicit non-inclusion can be overcome by virtue of the non-exhaustive nature of the list. Thus, subject to the presence of an action and a means, the omitted forms of exploitation could in fact be considered as forms of trafficking.<sup>21</sup>

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<sup>14</sup> UNODC, *Travaux préparatoires, of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (New York: United Nations, 2006), p. 334.

<sup>15</sup> UNODC (2006), supra n. 14, p. 354; ILO, *Note by the International Labour Organization on the additional legal instrument against trafficking in women and children*, A/AC.254/CRP.14, 1999.

<sup>16</sup> UNODC (2006), supra n. 14, p. 354; Informal note by the United Nations High Commissioner for Human Rights, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime Fourth session Vienna, 28 June-9 July 1999, A/AC.254/16, para. 8.

<sup>17</sup> UNODC Issue paper (2018), supra n. 7, p. 18.

<sup>18</sup> UNODC (2006), supra n. 14, p. 344, footnote 30.

<sup>19</sup> UNODC (2006), supra n. 14, p. 343, footnote 22. See for example, child soldiers and trafficking, Tiefenbrun, S., ‘Child Soldiers, Slavery and the Trafficking of Children’ (2007) *Fordham International Law Journal* 31(2), 417-486.

<sup>20</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15.4.2011, p. 1-11

<sup>21</sup> Edwards (2007-2008), supra n.9, p. 44.

Ultimately, the principal rationale for a non-exhaustive list of the forms of exploitation in the Palermo Protocol was to ensure flexibility for States when implementing their own domestic prohibition of human trafficking, particularly with regards to responses to sexual exploitation. Such an open-ended international approach purports to enable domestic legislative frameworks to adapt according to local contexts, securing the implementation of the definition of trafficking whilst assuring political cooperation.<sup>22</sup> In this sense, Gallagher and Parkes emphasise that the Palermo Protocol should be regarded as providing a set of minimum standards to be implemented by States according to their domestic context.<sup>23</sup>

This thesis contends that the rationale for the lack of a definition of exploitation overlooks the importance of legal clarity in definitions and the possible adverse impact upon the consideration of labour exploitation. The mere fact that the Palermo Protocol's domestic legal implementation in practice is characterised by a continued emphasis on the criminalisation of trafficking for sexual exploitation despite the extension of the Palermo Protocol to trafficking for labour exploitation suggests that such a critique is well-founded.<sup>24</sup> Ultimately, the lack of determination of the scope of the offence with regards to labour exploitation enables varying interpretations and inconsistencies in the understanding of what situations amount to exploitation within context of human trafficking in national legal orders (see Section 2.3).

Thus, when coupled with a lack of further explanation as to what constitutes exploitation, the categorical approach leads to a lack of conceptual and legal clarity for those who must implement the framework in regional and national contexts. Without a monitoring mechanism - notwithstanding the limited monitoring and implementation role of the Conference of Parties<sup>25</sup> - to ensure the application of the international

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<sup>22</sup> UNODC Issue paper (2018), supra n. 7, p. 22.

<sup>23</sup> Gallagher, A., *The International Law of Human Trafficking*, (Cambridge: Cambridge University Press, 2010), p. 501; Parkes, C., 'The trafficking protocol has advanced the global movement against human exploitation: the case of the United Kingdom', (2015) *Anti-Trafficking Review*, issue 4, 150-155, p. 150.

<sup>24</sup> For discussion on criminalisation of sexual exploitation using the trafficking model see Chuang, J., 'Rescuing trafficking from ideological capture: prostitution reform and anti-trafficking law and policy,' (2010) *University of Pennsylvania Law Review* 158(6), 1655-1728. See also Chapter 4 and discussion on obstacles to legal clarification of exploitation.

<sup>25</sup> Article 32, United Nations, *Convention against Transnational Organised Crime*, New York, 2000, UNTS, Vol. 2225, p. 209. Gallagher provides insight into state parties poor engagement with the monitoring mechanism and the limitations of the powers of the Conference of Parties to request further information or dialogue with state parties in 2004, in Gallagher, A., 'Improving the effectiveness of the international law of human trafficking: a vision for the future of the US Trafficking in Persons Report', (2011) *Human Rights Review* 12, 381-400. For more recent discussion on the implementation of the Convention and Protocols see Conference of the Parties to the United Nations Convention against Transnational Organized Crime (UNTOC), *Resolution 9/I, Establishment of the Mechanism for the Review of the Implementation of the United Nations Convention against Transnational*

definition ‘the onus is placed on individual States to act within their own domestic jurisdictions’ and crucially, ‘decide what constitutes trafficking in persons within their own jurisdiction.’<sup>26</sup> The newly adopted Resolution in the Conference of State Parties in 2018 may see a shift in this regard with the *Establishment of the Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*.<sup>27</sup> The impact of the new mechanism remains to be seen.

The flexibility of the Palermo Protocol can be further ascertained when considering regional anti-trafficking legal frameworks. A three-pronged approach emerges to the regional adoption of the international definition of human trafficking:

**i) no regional anti-trafficking instrument but explicit recognition of the international definition.** In the absence of specific anti-trafficking legal framework, both the Inter-American Commission<sup>28</sup> and Economic Community of West African States (ECOWAS)<sup>29</sup> have politically recognised the implementation of the international definition at a regional level.<sup>30</sup>

**ii) establishment of a regional anti-trafficking instrument which replicates the international definition.** Both Article 4(a) of the Council of Europe Convention against Trafficking in Human Beings (2005) and Article 2 of the Association of Southeast Asian Nations (ASEAN) Convention Against Trafficking in Persons, Especially Women and Children (2016) replicated the international definition of human trafficking. For the Council of Europe, this approach was favoured in recognition of the ‘fundamental importance to use a definition of trafficking in human beings on which

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*Organized Crime and the Protocols thereto, adopted by Conference of the Parties to the United Nations Convention against Transnational Organized Crime (UNTOC) at ninth session, Vienna, 15-19 October 2018.*

<sup>26</sup> Allain (2013), *supra* n. 1, p.342; Allain, J., ‘No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol’, (2014) *Albany Government Law Review* 14, 1-22, p. 1.

<sup>27</sup> Conference of the Parties to the United Nations Convention against Transnational Organized Crime (UNTOC), *Resolution 9/1, Establishment of the Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, adopted by Conference of the Parties to the United Nations Convention against Transnational Organized Crime (UNTOC) at ninth session, Vienna, 15-19 October 2018.*

<sup>28</sup> Article 6(1) of the *American Convention on Human Rights* (Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969) prohibits slavery, servitude, trafficking in women and slaves in all its forms and Article 6(2) prohibits requiring someone to perform forced or compulsory labour.

<sup>29</sup> Article 5 of the *African Charter of Human and Peoples’ rights* (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986) focuses upon right to respect of dignity and prohibits all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment.

<sup>30</sup> Inter-American Commission on Human Rights, *Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System* (December 2015), Para 220; Economic Community of West African States, *Declaration on the Fight against Trafficking in Persons*, Twenty-Fifth Ordinary Session of Authority of Heads of State and Government, Dakar, (December 2001).

there is international consensus.<sup>31</sup> The modelling of the regional definitions on the Palermo Protocol is also a trend observed at national level, as noted by Eriksson.<sup>32</sup>

**iii) establishment of a regional anti-trafficking instrument that extends the definition of human trafficking.** The European Union initially adopted a definition of human trafficking that was very similar in scope to the international definition. The Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings sought slight variation with an additional “act” of exchange or transfer of control and the specificity of pornography as a form of sexual exploitation:

*The recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where:*

*(a) use is made of coercion, force or threat, including abduction, or*

*(b) use is made of deceit or fraud, or*

*(c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or*

*(d) payments or benefits are given or received to achieve the consent of a person having control over another person*

*for the purpose of exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or*

*for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography.*

The definition within the Framework Decision was acknowledged when it comes to the inclusion of human trafficking in Article 5(3) of the Charter of Fundamental Rights of the European Union.<sup>33</sup>

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<sup>31</sup> Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, Warsaw, 16.V.2005 (2005), para 72.

<sup>32</sup> Eriksson, M., ‘The prevention of human trafficking – Regulating domestic criminal legislation through the European Convention on Human Rights’, (2013) *Nordic Journal of international Law* 82, 339-368, p. 357.

<sup>33</sup> Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407; Explanation on Article 5 — Prohibition of slavery and forced labour, Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007.



In 2011, following an evaluation of the Framework Decision<sup>34</sup> and in light of subsequent criticism regarding the lack of focus on the protection of the rights of the victims (unlike the aforementioned Council of Europe Convention), a proposal was made for a new Directive on the basis of Article 82 (2) and Article 83(1) of the Treaty on the Functioning of the European Union.<sup>35</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims (EU Directive 2011/36/EU) expanded the scope of human trafficking by adopting a slightly modified version of the international definition. Article 2(1) defines human trafficking as:

*The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.*<sup>36</sup>

Article 2(3) retains the categorical, non-exhaustive approach but explicitly adds two forms of exploitation to the list of types of forced labour or services: begging and exploitation of criminal activities.<sup>37</sup> Such an expansion of the forms of exploitation in the EU Directive's articulation of the human trafficking offence is indicative of the lack of a definition of the exploitation element.

A common thread of all the international and regional definitions of human trafficking is the listing of all forms of labour exploitation as, at a minimum, slavery or practices similar to slavery, servitude and forced or compulsory labour. Rather than provide further clarification as to the exact scope and meaning of these forms of

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<sup>34</sup> Commission of European Committees, *Report from the Commission to the Council and the European Parliament based on article 10 of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings*, Brussels, 02.05.2006 COM (2006) 187 final.

<sup>35</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA*, Brussels, 29.3.2010 COM (2010)95 final 2010/0065 (COD).

<sup>36</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15.4.2011, p. 1–11.

<sup>37</sup> European Commission (2010), supra n.35, p.10. European Economic and Social Committee, *Opinion of the European Economic and Social Committee on the 'Proposal for a directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA'*, 17.2.2011 COM(2010) 95 final — 2010/0065 (COD), para 3.6-3.7.

exploitation, and despite efforts to include such clarification at drafting stages,<sup>38</sup> the default position in the final adopted texts has been to refer to other international and regional instruments or - in the case of the Council of Europe informed by regional human rights case law.<sup>39</sup> However, the international and regional instruments discussed thus far, fail to provide clarity as to the scope and meaning of labour exploitation in two ways. First, they reinforce the categorisation of exploitation rather than define the concept and secondly, they sanction the expansion of the forms of exploitation, thus encouraging domestic law makers to expand human trafficking leading to increased fragmentation at a national level and possible dilution of human trafficking. In a European context, such a position hampers efforts to enhance judicial cooperation in criminal matters within the European Union as explicitly mentioned in Article 82 of the Treaty on the Functioning of the European Union.<sup>40</sup> Despite human trafficking being an offence whereby the double criminality requirement is waived in many EU instruments,<sup>41</sup> it is nevertheless difficult for cross-border cooperation where the constituent elements of the offence vary, leading to exploitative conduct being recognised as human trafficking in one country but not in another.

Whilst, as we have seen in this section that the flexibility offered to States is deliberate, there are significant implications on definitional clarity (and indeed definitional ambiguity) due to the substantial and wide-ranging consequences for States, the perpetrators and the victims when characterising conduct as trafficking.<sup>42</sup> The next section addresses such concerns by determining the impact of a lack of definition of exploitation in human trafficking.

## **2. The impact of a lack of a definition of exploitation in human trafficking law**

Overcoming ambiguity, seeking clarity, and ensuring effective anti-trafficking measures can only be achieved by placing an increased emphasis on ‘understanding

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<sup>38</sup> See proposals for definition of terms such as forced labour, servitude, slavery in UNODC (2006), *supra* n. 14, p. 339-345.

<sup>39</sup> Council of Europe (2005), *supra* n.31, para 89-95.

<sup>40</sup> Article 82 & Article 83, Treaty on the Functioning of the European Union, Document C2012/326/01; Beernaert, M-A., & Le Coq, P., ‘La loi du 10 août 2005 modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains et contre les pratiques des marchands de sommeil’, (2006) *Revue de droit pénal et de criminologie* 86(4), 335-406, p. 343.

<sup>41</sup> Article 2, Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision 2002/584/JHA, OJ L 190, 18.7.2002, p. 1-20; Article 11, Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, p. 1-36.

<sup>42</sup> UNODC Issue paper (2018), *supra* n. 7, p.2.

what constitutes trafficking and correctly applying international definitions.’<sup>43</sup> The way in which terms are framed will inevitably impact upon initiatives that seek to offer a solution and tackle labour exploitation.<sup>44</sup> In particular, previous research conducted at both a regional and national level has demonstrated that one of the main issues of contention created by the imprecision of international and regional trafficking definitions, is the determination of the point at which employment practices become exploitative,<sup>45</sup> especially given the lack of global consensus on employment rights and ‘variation between countries and variation between economic sectors in the same country in terms of what is socially and legally constructed as acceptable employment practice.’ We will further consider this proposition in subsequent chapters wherein the contextualised nature of exploitation becomes apparent in the diversity between geographical and temporal norms (see the analysis of *Tang* in Chapter 2) and the need to assess a situation on a case by case basis (see Chapter 9).<sup>46</sup> The EU Agency for Fundamental Rights concludes that, ‘the lack of a succinct concept and term impedes the drawing of clear boundaries, in relation both to distinguishing between different criminal offences and to differentiating between criminal and mere civil and labour law issues.’<sup>47</sup> Concretely, as argued by Weitzer, such a situation creates difficulties when applying and interpreting the legal standards in practice due to confusion and uncertainty.<sup>48</sup>

The present section addresses four problems that arise from the lack of a definition of exploitation in the human trafficking context: a **conflation and confusion in terminology** (Section 2.1) fosters a **stereotypical understanding** of labour exploitation (Section 2.2) and **fragmented and inconsistent** domestic implementation (Section 2.3) that perpetuates **legal uncertainty** (Section 2.4).

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<sup>43</sup> The Anti Trafficking Monitoring Group, *Before the Harm is Done Examining the UK's response to the prevention of trafficking*, (September 2018), p. 10.

<sup>44</sup> For discussion on shift of focus on labour violations initially, rather than more than severe extreme cases that are addressed by criminal offences, framing exploitation from labour law perspective, as well as shift away from context of migration, see Radeva Berket, M., *Labour exploitation and trafficking for labour exploitation—trends and challenges for policy-making*, ERA Forum (2015) 16, 359–377.

<sup>45</sup> European Union Agency for Fundamental Rights, *Severe labour exploitation: workers moving within or into the European Union States' obligations and victims' rights*, June 2015, p.38-39.

<sup>46</sup> Anderson, B., & Rogaly, B., *Forced Labour and Migration to the UK*, Compas, Trade union congress: 2005, p. 17-18.

<sup>47</sup> FRA (2015), *supra* n.45, p.38-39.

<sup>48</sup> Weitzer, R., ‘Human trafficking and contemporary slavery’, *Annual Review of Sociology* (2015) 41, 223-242, p. 225.

## 2.1 Confusion and conflation between forms of exploitation

The lack of a definition of exploitation and the categorical approach discussed above has led to the interchangeable use of terminology. For instance, the terms forced labour, trafficking, “modern slavery” and slavery are often conflated, despite the fact that they have different meanings (in both legal and non-legal terms) and thus require distinct measures in order to be tackled effectively.<sup>49</sup> Conflation of terminology is illustrated by the variety of interpretations in literature, that are briefly outlined by reference to some illustrative examples from both academic and policy standpoints.

On the one hand, there are those who subscribe to forced labour as the umbrella term. For instance, Skrivankova notes that:

*Trafficking is a sub-set of forced labour, rather than a synonym of forced labour, as sometimes erroneously understood. The existence of forced labour, independent of trafficking, implies that if forced labour is punishable only when linked to trafficking, those in non-trafficked forced labour find it even more difficult, if not impossible, to seek justice.*<sup>50</sup> [emphasis added]

Similarly, Andrees & van der Linden summarised that:

*Trafficking appears to be part of the larger occurrence of forced labour, which in turn is a subgroup of forced labour outcomes of migration, which, finally, belongs to the encompassing category of abuses and exploitation related to labour migration.*<sup>51</sup> [emphasis added]

Conversely, Ollus, for example, frames human trafficking as the umbrella term, as she writes that:

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<sup>49</sup> For example, conflation and equation of trafficking with forced labour by the Obama Administration Trafficking in Persons Office cited in Chuang (2017), supra n.9, p.115. See also Rijken, C., (ed.) *Combating trafficking in human beings for labour exploitation* (Wolf Legal Publishers, 2011), p. 35, p. 41, p. 118, p.352.

<sup>50</sup> Skrivankova, K., *Between decent work and forced labour: examining the continuum of exploitation*, JRF programme paper (November 2010), p. 9.

<sup>51</sup> Andrees, B., & van der Linden, M., ‘Designing Trafficking Research from a Labour Market Perspective: The ILO Experience,’ (2005) *International Migration* 43(1/2), 66, p. 66.

*Since the [Palermo] Protocol definition of trafficking sees forced labour as one form of exploitation in the crime of trafficking, **forced labour could instead be seen as subordinate to (labour) trafficking**. It is evident that the **two phenomena are indeed closely related and partly overlapping rather than encompassing one or the other**.*<sup>52</sup>  
[emphasis added]

As can be seen from the above examples, assessments of the interrelationship between human trafficking for labour exploitation and the standalone forms of labour exploitation vary, which significantly impacts the overall understanding of labour exploitation. In particular, as Gallagher highlights, the ambiguities of the human trafficking definition has seen an increase in slavery, forced labour and other forms of exploitation, that had hitherto been clearly distinguished, being equated with human trafficking.<sup>53</sup> For instance, Edwards discusses the marked increase in the reference to human trafficking in the Concluding Observations of the Human Rights Committee as well as Member States being asked about their efforts to eliminate human trafficking, despite the non-prohibition of human trafficking in Article 8 of the ICCPR.<sup>54</sup> Similarly, Gallagher notes the frequent assimilation between slavery and human trafficking by the UN General Assembly.<sup>55</sup> Rijken has critiqued the fluctuating position of the ILO between an emphasis on forced labour as the umbrella term which includes human trafficking, to then recognising, in line with a more generally held view, that not all forms of forced labour fall within the definition of human trafficking – the latter view being one that also exists amongst legal scholars.<sup>56</sup> More recently, the ILO has co-opted for the umbrella term of “modern slavery” to refer to a set of specific legal concepts including forced labour, debt bondage, forced marriage, other slavery and slavery like practices and human trafficking.<sup>57</sup>

In legal terms, the Palermo Protocol considers forced labour to be one of the possible outcomes of human trafficking. So, it is possible for human trafficking and

<sup>52</sup> Ollus (2015), supra n.1, p. 237.

<sup>53</sup> Gallagher, A., ‘Two Cheers for the Trafficking Protocol’, (2015) *Anti-Trafficking Review* Issue 4, 14—32.

<sup>54</sup> Edwards (2007-2008), supra n.9, p. 26.

<sup>55</sup> Gallagher, A., ‘Using international human rights law to better protect victims of human trafficking: the prohibitions on slavery, servitude, forced labour and debt bondage’ in Sadat, L.N., & Scarf, M.P., (eds) *The Theory and Practice of International Criminal Law: Essays in Honour of M. Cherif Bassiouni*, (Leiden: Martinus Nijhoff, 2008) pp 397 – 430.

<sup>56</sup> Rijken, C., ‘Trafficking in human beings for labour exploitation: cooperation in an integrated approach’, (2013) *European Journal of Crime, Criminal Law and Criminal Justice* 21, 9-35, p. 16. See also, Weitzer (2015) supra n.48, p. 227; Plant, R., ‘Combating Trafficking for Labour Exploitation in the Global Economy: The Need for a Differentiated Approach’, in Kotiswaran, P., (ed.) *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, (Cambridge: Cambridge University Press, 2017). Chuang (2017), supra n.9, p. 118.

<sup>57</sup> ILO, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, Geneva, September 2017, p.9.

forced labour to be interrelated. However, this thesis supports existing literature that calls for a definitive shift away from the conflation of all forced labour as human trafficking as they are not synonymous legal terms,<sup>58</sup> especially since, as Gallagher emphasises that '[human] trafficking was not even identified as an analogous or similar practice but was dealt with through a different set of instruments lends considerable weight to the argument that States never intended the prohibition to extend to this particular practice.'<sup>59</sup> Such conflation of concepts also leads to the application of the human trafficking label to a particular situation where there is a risk of hampering proper identification, investigation, and prosecution of cases as all the elements of the crime of trafficking may not be present or may be difficult to prove.<sup>60</sup> Furthermore, in the absence of a legal definition of labour exploitation, the conflation of human trafficking with standalone forms of exploitation has, as Chuang reminds us, implications for the 'individuals directly affected by the legal regimes designed to identify perpetrators and provide redress to victims of slavery, trafficking and forced labour practices.'<sup>61</sup>

On the one hand, conflation of trafficking with other forms of exploitation could risk raising the threshold for what counts as trafficking, as not all forms of labour exploitation amount to forced labour or slavery but they may be sufficient to cross the threshold of human trafficking, should all other elements of the crime be present.<sup>62</sup> For instance, as indicated by the ILO Handbook for labour inspectors on human trafficking and forced labour, 'the lack of viable economic alternatives that makes people stay in an exploitative work relationship does not in itself constitute forced labour though it may constitute a position of vulnerability as defined by the Palermo Protocol.'<sup>63</sup> On the other hand, conflating human trafficking with slavery or forced labour could dilute the legal standards of the latter two forms of exploitation, as Bakirci puts forward, by

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<sup>58</sup> Vijayarasa, R., & Villarino J.M.B., 'Modern-day slavery? A Judicial Catchall for Trafficking, Slavery and Labour Exploitation' (2012) *Journal of International Law and International Relations* 8, 36-61, p.36; Piotrowicz, R., "'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations", (2012) *International Journal of Refugee Law* 24(2), 181-201; O'Connell Davidson, J., "New Slavery, Old Binaries: Human Trafficking and the Borders of 'freedom,'" (2010) *Global Networks* 10(2), 244-61; Allain, J., 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery', (2010) *Human Rights Law Review* 10(3), 546-57; Gallagher, (2010), *supra* n. 23, p. 189; van der Wilt (2014) *supra* n.3, p. 314 & p. 334; Gallagher (2008), *supra* n.55.

<sup>59</sup> Gallagher (2008), *supra* n.55.

<sup>60</sup> Paavilainen, M., 'Towards a Cohesive and Contextualised Response: When is it necessary to distinguish between forced labour, trafficking in persons and slavery?', (2015) *Anti-Trafficking Review*, issue 5, 158-161, p. 159; See also the findings of the EU Fundamental Rights Agency research on severe labour exploitation, FRA (2015), *supra* n.45, p.42.

<sup>61</sup> Chuang, J., 'The Challenges and Perils of Reframing Trafficking as "Modern-Day Slavery"', (2015) *Anti-Trafficking Review*, issue 5, 146-149, p. 146-147.

<sup>62</sup> Chuang (2015), *supra* n.61, p. 146-147; FRA (2015), *supra* n.45.

<sup>63</sup> ILO, *Forced labour and human trafficking: a handbook for labour inspectors*, Andrees, B., Geneva, 2008, p.5.

defining ‘any kind of labour resulting from human trafficking [...] as forced labour regardless of the nature of the work or working conditions.’<sup>64</sup>

Labelling all human trafficking for labour exploitation as forced labour, neglects any consideration of the elements of the legal definition of forced labour (involuntary provision of work or service under a menace of any penalty – see Chapter 3) and instead prioritises the elements of the crime of human trafficking. This is particularly risky, as the same situation of exploitation in isolation from the means and act elements may not be sufficient to amount to forced labour. Such a situation must be avoided. Here it is important to reflect upon the findings of the EU Agency for Fundamental Rights which concluded that efforts to overcome such scenarios are hampered by the ‘lack of understanding of labour exploitation – in particular when it occurs within the contractual framework of an employment relationship – comes with the risk that cases of severe labour exploitation will be overlooked or not taken seriously.’<sup>65</sup>

Indeed, such oversight is further provoked by misconceptions of human trafficking, such as the role of coercion. For instance, a significant misconception is the assumption that it is essential for human traffickers to employ extreme *modus operandi* (both in relation to the use of means and the actual exploitation), including use of force, violence, kidnapping and deprivation of liberty.<sup>66</sup> Such a stereotypical understanding, however, fails to consider the subtler forms of coercion that can engender exploitation and can be attributed to the lack of definition that has led to the lack of understanding of the parameters of the context.<sup>67</sup> Luckily, subtler forms of coercion are increasingly being recognised in the application of the human trafficking offence. Acknowledgement of the agency of migrants seeking a better life means that there is increasing acceptance that it is no longer necessary for workers ‘to be forced at gunpoint

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<sup>64</sup> Bakirci, K., ‘Human trafficking and forced labour: a criticism of the International Labour Organisation’, (2009) *Journal of Financial Crime* 16(2), 160-165, p. 163.

<sup>65</sup> FRA (2015), *supra* n.45, p. 42.

<sup>66</sup> Ollus, N., & Jokinen, A., *Trafficking for Forced Labour and Labour Exploitation – Setting the Scene*, in Ollus, N., & Jokinen, A., & Aromaa, K., (eds.) *Trafficking for Forced Labour and Labour Exploitation in Finland, Poland and Estonia*, FLEX-HEUNI (2011), p. 131.

<sup>67</sup> It is important to note that such a stereotypical understanding is not only limited to human trafficking similar misconceptions prevails regarding the requirement for the actual use of violence leading to oversight of possible exploitative situations. For further discussion and examples of misconceptions of human trafficking see FRA (2015), *supra* n.45, p. 15 and Economic Community of West African States Community Court of Justice, *Hadijatou Mani v. Republic of Niger* (2008), ECW/CCJ/JUD/06/08, (27 October 2008), para 79. For discussion on ECOWAS case see ILO, *Forced Labour and Human Trafficking Casebook of Court Decisions: a training manual for judges, prosecutors and legal practitioners*, Special Action Programme to Combat Forced Labour, Geneva, 2009, p.37.

to work under hazardous conditions.’<sup>68</sup> Instead, there is evidence of increased recognition that precarious working conditions are maintained through a combination of subtler forms of coercion, such as psychological pressure, intimidation and long working hours, control of the use of money, retention of passports, debt due to high recruitment and travel costs, and poor accommodation.<sup>69</sup> Such a shift towards increased recognition of subtle forms of coercion is an important development for the criminal justice process, since it is very often difficult to ‘persuade a jury that these subtle forms of coercion and deception can make up the criminal offences of forced labour or labour trafficking’ resulting in very few prosecutions.<sup>70</sup> Therefore, in this thesis we contend that a clearer understanding of the parameters of these prohibited practices will contribute towards overcoming such misconceptions by minimising confusion and conflation and enabling professionals to better inform and direct those who then come face to face with a factual situation.

## 2.2 Stereotypical understandings: a spotlight on vulnerability and consent

The impact of conflation and confusion has led to misconceptions, as highlighted in the previous section with regards to coercion. In this section, we wish to further address the stereotypical understanding of human trafficking with regards to two specific definitional elements that as we will see in later chapters are of relevance to the material scope of exploitation: the first considers the understanding of position of vulnerability and the second refers to the principle of irrelevance of consent.

**The abuse of a position of vulnerability** is explicitly included in the human trafficking definition as a means by which persons can be subjected to a range of actions such as recruitment, harbouring etc. for the purpose of exploitation. The concept of vulnerability is not explicitly referred to in the definition of other forms of labour exploitation. It is however contended that the lack of explicit reference to vulnerability in the latter does not preclude its significance when determining whether or not someone has been exploited. The relationship between the lack of a definition of

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<sup>68</sup> ILO, *Forced labour and trafficking in Europe: how people are trapped in, live through and come out*, Andrees, B., Working Paper, WP.57, Geneva, 2008, p. 7.

<sup>69</sup> Ollus (2015), *supra* n.1, p. 240.

<sup>70</sup> Plant, R., ‘Forced Labour, Slavery and Human Trafficking: When do definitions matter?’, (2015) *Anti-Trafficking Review*, issue 5, 153–157, p. 155.



exploitation and the vulnerability of an individual is of relevance for two reasons: i) the susceptibility or risk of being exploited and ii) the extent to which this vulnerability is abused as a means of perpetrating exploitation.<sup>71</sup>

Like exploitation, the presentation of abuse of a position of vulnerability in the human trafficking definition has been criticised as the concept is ambiguous lacking any further clarification as to the scope of its meaning.<sup>72</sup> The *travaux préparatoires* do provide some assistance wherein the concept is ‘understood to refer to any situation in which the person involved has no real or acceptable alternative but to submit to the abuse involved.’<sup>73</sup> An individual’s vulnerability should be determined on a case-by-case basis and ‘in determining whether the victim’s belief that he or she has no real or acceptable option is reasonable, the personal characteristics and circumstances of the victim should be taken into account.’<sup>74</sup> The *travaux préparatoires*’ failure to further elaborate upon the meaning of “real and acceptable alternative” or how it is to be applied in practice, causes further confusion when applying the notion of abuse of position to vulnerability to a domestic criminal law framework.<sup>75</sup> Further efforts have been made to address this deficit by outlining factors that make people vulnerable and requiring that, when applied in practice, there must not only be credible evidence of the existence of vulnerability but also of the abuse of that position of vulnerability.<sup>76</sup> However, such efforts have also been subject to critique as they fail to provide guidance on the *abuse* of a vulnerable position and how these indicators can or should be applied in the context of victim or perpetrator identification, criminal investigation or prosecution.<sup>77</sup>

The impact of this international haziness has been a disjointed domestic application of the concept, despite the need for criminal law provisions to clearly and specifically state what constitutes vulnerability and when its abuse constitutes a

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<sup>71</sup> Gallagher, A., & McAdam, M., ‘Abuse of a position of vulnerability within the definition of trafficking in persons’, in Piotrowicz, R., Rijken, C., & Uhl, B. H., (eds) *Routledge Handbook of Human Trafficking*, (Routledge, 2017), p. 186.

<sup>72</sup> Vijayarasa & Villarino (2012), supra n.58, p. 49.

<sup>73</sup> UNODC (2006), supra n. 14, p. 347.

<sup>74</sup> UNODC, *Guidance Note on ‘abuse of a position of vulnerability’ as a means of trafficking in persons in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (Vienna: United Nations, 2012), para. 2.5.

<sup>75</sup> UNODC Issue paper (2018), supra n. 7, p. 3.

<sup>76</sup> For discussion on different types of vulnerability (personal, situational, circumstantial) Gallagher, A., ‘The International Legal Definition of “Trafficking in Persons”: Scope and Application’ in Kotiswaran, P., (ed.) *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, (Cambridge: Cambridge University Press, 2017), p. 89-92; UNODC (2012), supra n.74, para. 2.3.

<sup>77</sup> Gallagher & McAdam (2017), supra n.71, p.187

criminal act.<sup>78</sup> In addition to lack of clarity, the application of abuse of a position of vulnerability has been fragmented (see more on fragmentation in next section). For example in some States, the abuse of position of vulnerability (or any means) is not a constituent element of the offence but an aggravating factor; the combination of abuse of position of vulnerability with another form of means; or the connection between abuse of position of vulnerability and intent to exploit where, for example, conditional intent is sufficient due to the exploiter's awareness of the vulnerable position.<sup>79</sup> The latter can be problematic as the fact of vulnerability rather than its abuse is sufficient to satisfy the means element, which could lead to including conduct that otherwise would not reach the threshold of human trafficking being prosecuted as such.<sup>80</sup> Thus it becomes clear that the mere existence of vulnerability is not sufficient, such a position of vulnerability must be subsequently abused.

The ILO provides possible insight to this distinction by providing explicit examples of abuse of position of vulnerability: threats of denunciation to the authorities, is a means of coercion where an employer deliberately and knowingly takes advantage of the vulnerability of a worker to compel him or her to work; taking advantage of the limited understanding of a worker with an intellectual disability; threatening women workers with dismissal or with being forced into prostitution if they refuse to comply with the employer's demands; and taking deliberate advantage of an individual's obligation to stay in a job due to the absence of alternative employment opportunities by imposing more extreme working conditions than would otherwise be possible.<sup>81</sup>

In spite of these efforts by the ILO to provide insight into the meaning of abuse of position of vulnerability, a number of misconceptions pertaining to the meaning of abuse of position of vulnerability lead to the oversight of factors that could in fact exacerbate vulnerability to exploitation, such as type of exploitation, gender and

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<sup>78</sup> For more examples of domestic interpretation of vulnerability in Germany, France and Italy see Malpani, R., 'Criminalising human trafficking and protecting the victims,' in Andrees, B., & Belser, P., (eds) *Forced Labour: Coercion and Exploitation in the private economy* (New York: Lynne Reiner Publishers, 2009), p.132-135.

<sup>79</sup> For example of a Dutch case of Chinese restaurant manager, conditional intent was sufficient due to his awareness of the vulnerable situations, irregular workers "begged for work" which was provided less than minimum wage and provided accommodation in shared room see discussion in Gallagher & McAdam (2017), supra n.71, p. 189 – 191.

<sup>80</sup> Gallagher & McAdam (2017), supra n.71, p. 193.

<sup>81</sup> ILO, *Hard to see, harder to count - Survey guidelines to estimate forced labour of adults and children*, Geneva, 2012, p. 16. See also ICMPD work on vulnerability to trafficking in migration context: Study on Trafficking Resilience and Vulnerability en route to Europe (STRIVE), [https://www.icmpd.org/fileadmin/user\\_upload/Project\\_Description\\_STRIVE.pdf](https://www.icmpd.org/fileadmin/user_upload/Project_Description_STRIVE.pdf); ICMPD, *Targeting Vulnerabilities The Impact of the Syrian War and Refugee Situation on Trafficking in Persons A Study of Syria, Turkey, Lebanon, Jordan and Iraq*, (2015).

migration status. For example, the exploitation of migrant workers in economic sectors unrelated to the sex industry is not taken as seriously.<sup>82</sup> Similarly, a further distinction is made according to the gender of migrant workers.<sup>83</sup> Where females are found to be in exploitative working conditions, there is an immediate response based upon an identification as a victim of human trafficking, whereas male victims are considered to be irregular migrants in violation of migration law.<sup>84</sup> The result being counter-trafficking responses that prioritise females and fail to address the needs of male victims,<sup>85</sup> leading to structural reinforcement of stereotypical views that obscures the reality of human trafficking. A final example arises where the issue is dealt with first and foremost in the context of irregular migration rather than as one of abusive labour conditions. Such an approach does not take into account the reality that many migrant workers may have entered a country by legal means, but that immigration restrictions have increased their vulnerability and by consequence the risk that they could be subjected to abusive labour conditions.<sup>86</sup> Herein lies a vicious circle, as ‘the poorer the working conditions of the most vulnerable, the greater the risks of and opportunities for serious forms of exploitation.’<sup>87</sup> However, such working conditions are compounded by the complexity of the situation for a migrant worker. Thus, the context in which exploitation occurs may increase the risk of more severe forms of exploitation.

The understanding of vulnerability must be sufficiently broad to capture the diversity of precarity encountered by those who are subjected to exploitative working conditions. It is also important to avoid a narrow stereotypical understanding of exploitation that focuses upon the “ideal” victim. In order to reflect the reality of the

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<sup>82</sup> Guardian, *Rape and abuse: the price of a job in Spain's strawberry industry?* 14 April 2019, available at: <https://www.theguardian.com/global-development/2019/apr/14/rape-abuse-claims-spains-strawberry-industry>. The article reports that ten Moroccan women say Spanish authorities have ignored claims they were trafficked, assaulted and exploited.

<sup>83</sup> Eriksson (2013) *supra* n.32, p. 359.

<sup>84</sup> Chuang (2010), *supra* n.24, p. 1711.

<sup>85</sup> *Ibid.*

<sup>86</sup> On structural exploitation and the role of state based initiatives (e.g. restrictive immigration policy) that increase vulnerability to exploitation in Chuang (2010), *supra* n.24, p. 1726-1727 and Mantouvalou, V., ‘The Right to Non-Exploitative Work,’ in Mantouvalou V., (ed.) *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing, 2015).

Consider specific implications of tied visas scheme on domestic workers: Weatherburn, A., & Muraskiewicz, J., ‘The impact of the 2012 Domestic Workers in a Private Household Visa on human trafficking for domestic servitude’, (2016) *Journal of Immigration, Asylum and Nationality Law* 30 (3), 204-221.

It is acknowledged that illegality does not necessarily guarantee that the individual will be subjected to exploitation, it is possible for individuals with an irregular migration status to not be subjected to exploitation, see further in Oudejans, N., ‘The Right not to Have Rights: A New Perspective on Irregular Immigration’ (2019) *Political Theory* 1–28. Research conducted with migrants in Amsterdam revealed that 2/3 of the migrants interviewed in the Amsterdam area mentioned that their jobs were relatively stable: in the sense that their working hours each week were quite predictable and stable. However, only half of the migrants who indicated that their jobs were stable, mentioned that they earned sufficient income to support themselves and their significant others, see Berntsen, De Lange & Rijken, *De sociaaleconomische- en rechtspositie van migranten zonder verblijfsvergunning in Nederland*, (Amsterdam University Press, forthcoming).

<sup>87</sup> Ollus, (2015), *supra*, n.1, p. 225.

situations encountered, it is important to consider different types of vulnerability, both intrinsic and created, including: economic vulnerability, social and cultural vulnerability, linguistic vulnerability, and legal/structural vulnerability.<sup>88</sup> In particular, people are trafficked not because they are vulnerable, but because someone decides to exploit them. It is not the victims who should be blamed for taking risks, but those recruiters and employers who take advantage of their desperation and exploit them. The demand of workers for labour is largely a question of inequality. Any work is better than no work, taking into account global economic disparities and increasing global mobility. Therefore, addressing workers' weak bargaining power, substandard working conditions, and lack of rights would be a shift in the right direction.<sup>89</sup>

The agency and bargaining powers of workers to accept such sub-standard conditions is now discussed with regards to **the principle of irrelevance of consent**. The Palermo Protocol human trafficking definition affirms the principle of irrelevance of consent to any exploitation where *any* of the specified means are used to secure the *act* (Article 3(b)). This raises two issues that require further consideration as to i) the irrelevance of consent and the understanding of involuntariness in the other standalone forms of labour exploitation and; ii) the nullification of consent regardless of the means used.

First, in the context of standalone forms of labour exploitation, whilst the role of consent is not explicitly excluded, there are elements of the legal definitions that point to the presence of coercion or involuntariness in these forms of exploitation (as we will see in Chapters 2 & 3). Thus, it also appears that the exploitation element of human trafficking which could be interpreted as also implying an involuntary element, which in some instances may lead to the application of a double requirement of coercion, in relation to both the act and purpose element. Similarly, by virtue of the human trafficking definition's sole focus of the means element on the action element leads to failures to address abuses where there are no means of deception or coercion to achieve, *inter alia*, recruitment, transportation or transfer but instead the means are used with a view to exploitation.

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<sup>88</sup> Radeva Berket (2015) *supra* n. 44, p.365; Ollus, N., & Jokinen, A., 'Exploitation of migrant workers and trafficking in human beings: a nexus of the demand by employers, workers and consumers', in Piotrowicz, R., Rijken, C., and Uhl, B. H., (eds) *Routledge Handbook of Human Trafficking*, (Routledge, 2017); Gallagher & McAdam (2017), *supra* n.71.

<sup>89</sup> Ollus & Jokinen (2017), *supra* n.88, p.498.

Second, consent is irrelevant regardless of the type of means used. However, in practice the extent to which such a position goes uncontested differs. On the one hand, where nullifying means such as force, abduction and gross deception are used the application of irrelevance is uncontested. Conversely, when it comes to softer means such as an abuse of position of vulnerability, the nullification of consent is sometimes difficult to determine.<sup>90</sup> Furthermore, it appears that the irrelevance of consent faces a higher standard where there is an abuse of position of vulnerability: the person to whom the consent is given must have abused an existing or created vulnerability in order to secure an act intended to result in exploitation.<sup>91</sup> The use of means alone is not enough; the result of the use of those means to execute the relevant act must be that the victim's consent is vitiated.

Despite the irrelevance of consent in the legal understanding of human trafficking, there is however a hesitancy to completely disregard the agency of workers and their apparent acceptance of exploitative labour conditions.<sup>92</sup> The demand for labour by workers means that there is always an element of willingness and expression of agency to take risks in order to improve their socio-economic position. This includes not only the migratory journey but also the labour standards that they are willing to endure for payment.<sup>93</sup> The impact of this leads to 'legitimising the migrant's exclusion from assistance or victimhood' and the emergence of a distinction between deserving and undeserving victims, with the latter being deprived of political agency. Furthermore, it is potentially dangerous to argue that workers' have consented to exploitative working practices as this will impact upon the understanding and scope of the absolute prohibition on slavery and forced labour in international law.<sup>94</sup> Such a situation can be avoided by redefining labour exploitation, not on the basis of agency and willingness but on the basis of any of the conditions that prevent the worker from leaving the exploitative conditions of employment.<sup>95</sup> Such a condition would mean that

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<sup>90</sup> Gallagher & McAdam (2017), supra n.71, p. 191.

<sup>91</sup> Gallagher (2017), supra, n.76, p. 96.

<sup>92</sup> Lasocik, Z., 'Human Trafficking: a challenge for the European Union and its member states (with particular reference to Poland)' in Holmes, L., (ed.) *Trafficking and human rights – European and Asia-Pacific Perspectives* (Edward Elgar, 2010), p. 24. Aronowitz, A., *Human Trafficking, Human Misery: The Global Trade in Human Beings*, (Plymouth: Scarecrow Press Inc., 2013), p. 5.

<sup>93</sup> Ollus & Jokinen (2017), supra n.88, p.498; Ollus, (2015), supra n.1, p. 225; Richards, K., 'The trafficking of migrant workers: what are the links between labour trafficking and corruption?', (2004) *International Migration* 42(5), 147-168, p. 154; Chuang (2017), supra n.9, p. 119.

<sup>94</sup> Lasocik (2010), supra n.92, p. 25; Borg Jansson, D., *Modern Slavery: A comparative study on the definition of trafficking in persons*, (Brill Publishers, 2014), p. 90.

<sup>95</sup> Ollus, (2015), supra n.1, p. 240. Rittich (2017), supra n.9, p. 250.

the mere violation of labour rights alone does not amount to exploitation, the vitiation of consent arises only in situations where the individual's situation reduces their ability to change their circumstances.

The issue of consent and voluntariness is of vital importance to the understanding of forms of exploitation that do not necessarily meet the high threshold of those practices prohibited by law. In particular, the assessment of whether or not someone chose to engage in a particular situation, should not require that the individual felt exploited at the time, and similarly, the range of limited choices available to them should be determined on a case by cases basis.<sup>96</sup> Additionally, and as seen in the context of a position of vulnerability, it is important to take note of the severe limitations enforced on personal choice fostered by a lack of alternatives.<sup>97</sup> To this assessment it is again important not to make a distinction between those who are deserving of protection (e.g. trafficking victims), and those who are willing (e.g. economic migrants) whereby there is an assumption that one precludes the other, leading to 'a rhetoric that suggests that agency and exploitation are mutually exclusive.'<sup>98</sup> Such a focus 'misses an opportunity to identify what might actually be driving the cycle of exploitation. As a matter of law, statutory interpretation, and practice, we must acknowledge that the desire to improve one's life, a desire born of human nature, and a human characteristic lauded in other arenas, leads people to migrate.'<sup>99</sup>

Despite the issues raised regarding the irrelevance of consent, we emphasise that the important aspect to consider in the context of labour exploitation is not the exercise of agency to seek alternative employment, nor the willingness to accept working conditions at the point of recruitment, it is, as previously mentioned, the assessment of an individual's ability to make a choice in light of limited alternative options. The principle vessel through which such an assessment can be determined is the level of employer's control over the worker, the employer's ability to determine, for instance, migration status, non-payment of wages, or arbitrary wage deductions; all

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<sup>96</sup> For discussion on subjectivity of coercion and different understanding of what constitutes extreme abuse and dangers of leaving see Brennan, D., 'Subjectivity of Coercion: Workers' Experiences with Trafficking in the United States', in Kotiswaran, P., (ed.) *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, (Cambridge: Cambridge University Press, 2017), p. 141.

<sup>97</sup> Haynes, D. F., 'Exploitation Nation: The Thin and Grey Legal Lines between Trafficked Persons and Abused Migrant Laborers', (2009) *Notre Dame Journal of Law, Ethics & Public Policy* 23(1), 1 -70, p. 18-20.

<sup>98</sup> Haynes (2009), supra n.97, p. 43-48 O'Connell Davidson, J., 'Troubling freedom: migration, debt, and modern slavery', (2013) *Migration Studies* 1(2): 176-195, p.177.

<sup>99</sup> Haynes (2009), supra n.97, p. 48.

limit the personal choices of the individual and exacerbates the dependency of the individual on the employer.<sup>100</sup> Ultimately, it is also debatable whether when a person is in a situation where s/he has only one opportunity, one choice, freedom of choice can truly be achieved.<sup>101</sup>

### 2.3 Fragmented and inconsistent domestic implementation

Allain writes that the Palermo Protocol has facilitated the advent of a neo-abolitionist era (see Chapter 4) that can be characterised by unprecedented engagement with the prohibition of human trafficking by States at the domestic level.<sup>102</sup> There is, however, cause for concern. In particular, many scholars, including Allain, consider the success of the global consensus on the definition of human trafficking to have been to the detriment of global legal clarification; ‘as even in situations where the Palermo Protocol definition of trafficking in persons is reproduced, it does not necessarily mean the same thing or constitute the same crime.’<sup>103</sup> Therefore, despite the consensus of an internationally agreed definition, Rijken correctly asserts that ‘this does not necessarily mean that its scope [...] is fully clear. The definition does not comprise clearly defined elements and terms and thus leaves room for different interpretation.’<sup>104</sup> Gallagher nevertheless advocates for continued recognition of the value of the international legal definition since it has accommodated a shift in focus from the criminalisation of the process of trafficking to the criminalisation of exploitation.<sup>105</sup> Indeed, much of the literature that raises concerns regarding the piecemeal approach to its domestic application shows that more is still to be done. However, we suggest that rather than overhauling the existing international framework, there is a need for continued efforts to harmonise regional and national counter-trafficking responses.<sup>106</sup>

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<sup>100</sup> Amnesty International, *Abusive Labour Migration Policies: submission to the UN Committee on Migrant Workers’ Day of general discussion on workplace exploitation and workplace protection* (7 April 2014), p. 8. See also third-party intervention from AIRE centre and PICUM that emphasised the notion of control in *Chowdury and others v. Greece*, 30 March 2017, Application no. 21884/15, para 67; see also Chapter 10.

<sup>101</sup> Skrivankova (2010), supra n.50, p.6. ILO (2005) supra n.5, p.6.

<sup>102</sup> Allain (2014) supra n.26, p.6.

<sup>103</sup> Allain (2014) supra n.26, p.9. See also Andrees & van Linden (2005), supra n. 51, p. 58; Kelly, L., ‘A conducive context: trafficking of persons in Central Asia’, in Lee, M. (ed.) *Human Trafficking*, (Devon: Willan Publishing, 2007), p. 86. International Organisation for Migration *Is trafficking in human beings demand driven? A multi-country pilot study*, Anderson, B., & O’Connell Davidson, J., Migration Research Series (2003), p. 7. Coghlan, D., & Wylie, G., ‘Defining Trafficking/Denying Justice? Forced Labour in Ireland and the Consequences of Trafficking Discourse’, (2011) *Journal of Ethnic and Migration Studies* 37 (9), 1513-1526, p. 1516

<sup>104</sup> Rijken. C., ‘A human rights-based approach to trafficking in human beings’ (2009) *Security and human rights*, 3, 212-222, p. 214.

<sup>105</sup> Hansard, *Joint Committee on the draft Modern Slavery Bill. Dr Anne Gallagher - written evidence, MSB0094*, 19 March 2014; Parkes (2015) supra n.23, pp. 150—155.

<sup>106</sup> For discussion of domestic implementation of human trafficking definition see Huang, J., ‘The United States as global sheriff: using unilateral sanctions to combat human trafficking,’ (2005-2006) *Michigan Journal of International Law* 27, 437, p. 468;

Whilst the rationale for an ambiguous wording and construction of the Palermo Protocol definition is clear (providing States with legal sovereignty when determining the exact material scope of the crime of human trafficking within their jurisdiction – as discussed in Section 1) the implications are twofold. First of all, by default, and as Allain writes, a non-exhaustive categorical definition has led to an expansion of the types of exploitation to be included as trafficking,<sup>107</sup> which consequently does not assist with providing clarity in the context of labour exploitation. Secondly, we can consider the work of Allain, Eriksson and Stoyanova who have explored the domestic implementation of the international human trafficking definition.<sup>108</sup> This thesis contends that the research draws attention to the impact of the lack of a definition of exploitation. For instance, Stoyanova concludes that the ‘simplistic incorporation of the international law definition of [human trafficking] leads to inadequacies’ and a lack of harmonisation.<sup>109</sup> More specifically, the Protocol’s failure to set the parameters of the ‘purpose’ of trafficking has led to the inclusion of a wide range of practices both regionally, e.g. begging and forced criminality as additional forms in the European Union Directive, and nationally. The extension of the forms of exploitation are illustrated by both Allain and Gallagher, with the inclusion of illegal, unethical adoptions; commercial surrogacy; begging; prostitution/pornography; involvement in criminal activities; use in armed conflict or religious rituals; and kidnapping for purposes of extortion or political terrorism.<sup>110</sup>

On the one hand, some countries have more expansively defined certain forms of labour exploitation within their domestic trafficking definition. For example, prior to the revision of the Criminal Code in 2016, Germany had domestically defined human trafficking for the purpose of forced labour more expansively than the ILO forced labour definition.<sup>111</sup> Section 232(1) of the Criminal Code (human trafficking) refers to - in addition to slavery, servitude or bonded labour - making a person work under

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Vijayarasa & Villarino (2012), supra n.58, p. 65; van Voorhout, J. C., ‘Human trafficking for labour exploitation: interpreting the crime’ (2007) *Utrecht Law Review* 3(2), 44-69, p. 58; Allain (2014), supra n.26, p.8; Parkes (2015) supra n.23, p. 150.

<sup>107</sup> Allain (2014), supra n.26, p.8.

<sup>108</sup> For analysis of GRETA country reports, including *inter alia* Croatia, Denmark and Slovak Republic see Stoyanova, V., ‘Article 4 of the ECHR and the obligation of criminalizing slavery, servitude, forced labour and human trafficking’, (2014) *Cambridge Journal of International and Comparative Law* 3(2), 407-433, p. 434.

For analysis of domestic interpretation see Allain (2014), supra n.26, p.8.

For discussion on domestic implementation of Palermo Protocol with analysis of jurisprudence from European Court of Human Rights see Eriksson (2013) supra n.32, pp.349-357.

<sup>109</sup> Stoyanova (2014), supra n.108, p. 434.

<sup>110</sup> For examples of different forms of exploitation in national law going beyond the international definition see Gallagher, (2015), supra n.53 and Allain (2014), supra n.26, p.9-10.

<sup>111</sup> Malpani (2009), supra n.78, p.139.



working conditions that are in clear discrepancy to those of other workers performing the same or a similar activity”.<sup>112</sup> In France, Article 225-14-1 of the Criminal Code defines “forced labour” as the act of forcing a person, through violence or threat, to carry out work without remuneration or for remuneration manifestly bearing no relation to the scale of the work carried out. In Romania, prior to the entry into force of the new Criminal Code in 2014, a very broad definition of labour exploitation provided that violations of legal rules on working conditions, wages, health and security constitute exploitation.<sup>113</sup> The *travaux préparatoires* of the Palermo Protocol clearly demonstrate that such expansive domestic interpretations are contrary to the intentions of the drafters of the international definition.<sup>114</sup>

On the other hand, in certain domestic settings, an expansive approach to human trafficking has moved beyond the categorical understanding of exploitation, with reference to concepts that have no precedent in international law: for example, in Belgium, trafficking for economic exploitation is defined as working or living conditions contrary to human dignity, which will be discussed in more detail when we outline the national legal framework in Chapter 8. This brief insight into the different national approaches to criminalising human trafficking, reinforces the findings of the EU Fundamental Rights Agency which concluded that the forms of exploitation enumerated in the Protocol are in fact the lowest common denominator.<sup>115</sup>

Consequently, Edwards correctly asserts that the lack of consistency in domestic definitions of human trafficking leads to ‘a piecemeal, uncoordinated and ineffective response’.<sup>116</sup> Overall, the lack of harmonisation in law regarding the meaning of exploitation and regarding acceptable employment practices can be detrimental to combatting labour exploitation. Rijken draws attention to the impact of such a position as it may ‘have negative consequences for the awareness of [human trafficking] and the erosion of the crime. In these occasions it is perfectly possible that in the end people will not consider [human trafficking] to be a severe crime, which will

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<sup>112</sup> Council of Europe, *7th General Report on GRETA’S Activities* (2018), p. 34.

<sup>113</sup> For previous Criminal Code see in Zaharia, G.C., ‘Combating Trafficking in human beings for labour exploitation in Romania,’ in Rijken, C., (ed.) *Combating trafficking in human beings for labour exploitation* (Wolf Legal Publishers, 2011), pp.164-166. For current criminal framework, see GRETA, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Romania, Second Evaluation Round*, Strasbourg, 30 September 2016, GRETA (2016) 6, p. 7 & p.34.

<sup>114</sup> UNODC (2006), supra n. 14.

<sup>115</sup> FRA (2015), supra n.45, p.42.

<sup>116</sup> Edwards (2007-2008), supra n.9, p. 52.

diminish all the efforts that have been made to put [human trafficking] on the (political) agenda.’<sup>117</sup>

One solution for achieving harmonisation, according to Allain, could be for scholars and practitioners to turn to international labour standards in order to establish a line between exploitative labour and legitimate labour.<sup>118</sup> However, such an approach may not be quite so simple, as the understanding of exploitation in employment practices is also much disputed.<sup>119</sup> As outlined by Anderson & O’Connell Davidson in their report on human trafficking and demand, there is a lack of global consensus on minimum labour standards, leading to ‘variations between countries and different economic sectors within a country concerning what are socially and legally acceptable employment practices.’<sup>120</sup>

With the lack of consensus regarding the international minimum labour standards, an alternative viewpoint proposes that the term exploitation should be understood as a free-standing concept - a proposition made during the process of legislative reform in England and Wales, as will be seen in Chapter 8 - in addition to those forms enumerated and defined in other legal instruments. If this approach were to be adopted, Stoyanova contends that exploitation itself would be understood as a form of abuse with a lower threshold than other listed forms of exploitation, thus permitting the concept of human trafficking to encompass lesser forms of harm.<sup>121</sup> In relation to labour exploitation, such an understanding could include abuses and violations of labour rights that are not criminalised.<sup>122</sup> Indeed, such an interpretation may align with the intention of the drafters of the Palermo Protocol, as the forms of exploitation are to include “at a minimum” those outlined in the text of the treaty. On the one hand, this reading offers a degree of flexibility. However, on the other hand,

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<sup>117</sup> Rijken (2013) *supra* n. 56, p. 15.

<sup>118</sup> Allain (2013), *supra* n.1, p. 212.

<sup>119</sup> IOM (2003) *supra* n.103, p. 8.

<sup>120</sup> *Ibid.*

<sup>121</sup> Stoyanova, V., ‘Dancing on the Borders of Article 4: Human trafficking and the European Court of Human Rights in the Rantsev case’ (2012) *Netherlands Quarterly of Human Rights* 30(2), 163-194, p. 180, pp. 183-184.

<sup>122</sup> See in this regard the Dutch conceptual framework developed as part of the labour exploitation thematic programme by the Inspection Service in 2016 and the distinction between labour exploitation and serious disadvantage / serious violations: A form of social economic crime in which employers consciously and intentionally violate laws and regulations. This concerns workers who are not exploited in the strict sense (in accordance with Article 273f) or for which this is not proven, but who have to do with underpayment, long working days, fines and (sexual) intimidation, and as such “become serious disadvantaged.” Inspectie SZW, *Jaarverslag 2016*, p.24.

the lack of clarity on this point, which is, in part, due to a lack of international jurisprudence (see Section 3), impedes the advancement of such an interpretation.

Notwithstanding, the need for a harmonised and clear approach to these concepts is particularly important at a national level since, as Paavilainen writes ‘law enforcement authorities need clear guidelines on how to apply their own national legislation and how to identify a case of forced labour, trafficking in persons or slavery.’<sup>123</sup> Therefore, it is important to develop a common understanding of what is meant by exploitation in order to avoid a dilution of the high standards required in international law, that could subsequently undermine prospects of securing successful prosecutions. Such a note of caution mirrors that which has been broached by scholars - including *inter alia* Gallagher, Nicholson, van der Wilt, Chuang, Ford, Vijayarasa & Villarino - when considering the consequences of legal uncertainty due to the lack of definition of slavery, servitude and forced or compulsory labour.<sup>124</sup>

## 2.4 Lack of legal certainty

In legal terms, Chuang emphasises that an indeterminate interpretation of the scope of the exploitation element in the human trafficking offence ‘risks violating the principle that crimes and punishments should be clearly defined in the law (*nullum crimen sine lege, nulla poena sine lege*), thus compromising the rights of the accused.’<sup>125</sup> The need for a clear definition is of great importance when ensuring certainty in a legal framework. Such certainty will help to secure the punishment of perpetrators and guarantee the rights of victims of labour exploitation (whether victims of human trafficking or not), including labour rights (such as wage arrears and social protection) and compensation for material and moral damages. These considerations were a key part of the discussion amongst experts when discussing the adoption of a supplementary instrument to the ILO Forced Labour Convention, 1930.<sup>126</sup>

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<sup>123</sup> Paavilainen (2015), supra n.60, p. 159; see also, Ollus, (2015), supra n.1, p. 225.

<sup>124</sup> Gallagher (2015), supra n.53; Nicholson, A., ‘Reflections on *Siliadin v France*: slavery and legal definition’, (2010) *International Journal of Human Rights* 14(5), 705-720, p. 712; van der Wilt, H (2014), supra n.3, p. 313; Chuang (2010), supra n.24, p. 1709; Vijayarasa & Villarino (2012), supra n.58, p. 41; Ford, M., ‘Trade Unions, Forced Labour and Human Trafficking’, *Anti-Trafficking Review*, issue 5, 2015, pp. 11–29, p.14.

<sup>125</sup> Chuang (2015), supra n.61, p. 146-147.

<sup>126</sup> ILO, *Tripartite Meeting of Experts on Forced Labour and Trafficking for Labour Exploitation Report for discussion at the Tripartite Meeting of Experts concerning the possible adoption of an ILO instrument to supplement the Forced Labour Convention, 1930 (No.29) (2013)*, Geneva, 11–15 February 2013), p. 39.

Legal certainty is of great importance especially when, as Allain reminds us, that the law is the principal vessel by which efforts are made to ‘seek to end human exploitation.’<sup>127</sup> Ensuring legal certainty would better equip frontline professionals, such as labour inspectors and police officers, to identify and tackle the issue as they would possess better knowledge and greater awareness of the many forms of exploitation. In criminal law, the principle of legality provides that the behaviour which amounts to a criminal offence must be clearly defined in order to provide legal certainty.<sup>128</sup> Furthermore, it is important that the criminal law is not ambiguous, so as to ensure that the defendant is aware of the criminalised conduct.<sup>129</sup> Importantly, Stoyanova highlights that it is not necessarily the labels that are required to determine sufficient criminalisation of certain offences in national law – although as has been seen in Section 2.1, clarification of terminology is crucial to conceptualising labour exploitation in law – it is that the national legal framework provides the opportunity for a broad and consistent interpretation of the criminal offences that constitute forms of labour exploitation.<sup>130</sup>

Legal uncertainty impacts upon how exploitation is understood in practice. For instance, much of Chuang’s argument when discussing the idea of “expansionist creep”<sup>131</sup> rests on its detrimental impact on legal certainty. For instance, Gallagher asserts that:

*Making all exploitation ‘trafficking’ [...] complicates the task of those who are at the front line of investigating and prosecuting trafficking, presenting particular challenges in countries that lack specialist capacity and robust criminal justice systems. In all countries the expansionist creep risks diluting attention and effort, and potentially deflecting attention from the worst forms of exploitation that are most difficult for States to address.*<sup>132</sup>

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<sup>127</sup> Allain (2013), supra n.1, p.108.

<sup>128</sup> Article 7 of the ECHR; More literature on principle of legality required. Shahabuddeen, M., ‘Does the Principle of Legality Stand in the Way of Progressive Development of Law?’ (2004) 2 *Journal of International Criminal Justice* 1007.

<sup>129</sup> See for instance, ECtHR, *Siliadin v. France*, 26 July 2005, Application No. 73316/01.

<sup>130</sup> Stoyanova (2014), supra n.108, p. 424-425.

<sup>131</sup> Chuang, J., ‘Exploitation Creep and the Unmaking of Human Trafficking Law’, (2014) *American Journal of International Law* 108, 609.

<sup>132</sup> Gallagher (2015), supra n.53.

Equally connected to the impact of “expansionist creep”, is Rijken’s contention that the ambiguity of the concept of exploitation leads to difficulties for national judiciaries to successfully prosecute alleged human traffickers.<sup>133</sup>

It must be noted that the suggested ambiguity of exploitation in human trafficking is contested by Allain who argues that since the prohibited practices are clearly enumerated in law, exploitation should therefore be understood with reference to the legal instruments that define these practices. For Allain, these legal standards are the pivot and, when read in conjunction with the international labour standards, establish a line between exploitative labour and legitimate labour.<sup>134</sup> Thus, the role of the courts is to determine exactly what constitutes labour exploitation according to these legal standards.<sup>135</sup> Notwithstanding, there are examples of practical difficulties when it comes to the application of the ambiguous elements of the human trafficking definition. For example, judiciaries face significant difficulties in interpreting the meaning and scope of the offence.<sup>136</sup> Varying judicial interpretations can lead to different outcomes,<sup>137</sup> and lack of sufficient legal direction to juries.<sup>138</sup> Such procedural irregularity is borne out of the lack of clarity in the law and can lead to miscarriages of justice.

The role of the courts and judiciary is therefore crucial but can only be bolstered with legal certainty which requires further legal guidance. At present, there is limited guidance and assistance on the material scope of the treaty provisions that enumerate forms of exploitation. This gap could be addressed by the United Nations Human Rights Committee - which as previously mentioned, increasingly employs the term human trafficking - in a General Comment providing clarification as to the material scope of the prohibited practices under Article 8 of the International Covenant on Civil and

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<sup>133</sup> Rijken, (2011), supra n.49, p. ii.

<sup>134</sup> Allain (2013), supra n.1, p. 3 & p. 212.

<sup>135</sup> Allain (2013), supra n.1, p. 8.

<sup>136</sup> Dutch Supreme Court (Hoge Raad), 27 October 2008, ECLI:NL:HR:2009:BI7099 (<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2009:BI7099&key> (accessed 31 July 2013)), cited in van der Wilt, H., (2014), supra n.3, p. 323-324.

<sup>137</sup> van Voorhout (2007) supra n.106, p. 58. For instance, in the Netherlands, it has been explicitly left to the judiciary to further define exploitation see, Rijken, (2013) supra n.56, p. 14.

<sup>138</sup> See discussion on Court of Appeal case R v SK [2011] EWCA Crim 1691 in Stoyanova (2014), supra n.108, p. 433; See discussion *The Queen v Tang* [2008] HCA 39, August 28, 2008 M5/2008: discussion regarding the erroneous and inadequate directions to the Jury by the trial judge, in Allain, J., ‘Case Notes: Rv Tang – clarifying the definition of ‘slavery’ in international law’, (2009) *Melbourne Journal of International Law* 10, 246-257, p. 248 and Tully, S., ‘Sex, slavery and the High Court of Australia: The contribution of R v Tang to International Jurisprudence’, (2010) *International Criminal Law Review* 10, 403-423, p. 413.

Political Rights (ICCPR).<sup>139</sup> Indeed, the Committee's lack of engagement has been critiqued.<sup>140</sup> Promisingly, the first ever UN Treaty Body General Recommendation on human trafficking is currently being drafted by CEDAW Committee.<sup>141</sup> Whilst this is a laudable development, it is potentially limiting in scope as the mandate of this particular treaty body may lead to an overemphasis on human trafficking of women and girls for the purpose of sexual exploitation (see Chapter 4).

At a European regional level, it is increasingly noted that not all types of exploitation would qualify as human trafficking. As the latter is ultimately a distinct concept, then broader discussion is needed to clarify what is meant by exploitation in human trafficking as being distinct from the standalone forms of exploitation. Not too long ago, there was a lack of impetus and limited engagement to clarify what these forms are and how they should be handled in the legal framework.<sup>142</sup> At the time of writing, there does appear to have been more of a recent shift towards clarifying the scope of labour exploitation, as mentioned in the Introduction.<sup>143</sup>

This shift is extremely promising, as the examples above reinforce Nicholson's argument that 'a lack of clarity can be fatal to proper interpretation, implementation and/or enforcement of the law and therefore in providing protection or satisfaction to individuals.'<sup>144</sup> Again, taking into account the need for international and regional anti-trafficking instruments to be enforced through domestic legal frameworks, Nicholson argues that 'any ambiguity may result in inconsistency of implementation from State to State, which may raise issues of fair labelling and/or result in a lack of equality of protection.'<sup>145</sup> She argues that any lack of clarity will not only make it difficult for those who are in a position to identify situations of labour exploitation, but also for those who are suffering from exploitative labour conditions but are discouraged from seeking

<sup>139</sup> For discussion on scope of indirect engagement with human trafficking in General Comments see Edwards (2007-2008), *supra* n.9.

<sup>140</sup> Gallagher, A., 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway', (2009) *Virginia Journal of International Law* 49, 799-848, p. 821.

<sup>141</sup> UN CEDAW Committee, *Concept Note, prepared for the Committee on the Elimination of Discrimination Against Women on its elaboration of a General Recommendation on Trafficking in Women and Girls in the Context of Global Migration*, available at: <https://www.ohchr.org/Documents/HRBodies/CEDAW/Trafficking/ConceptNote.docx>.

<sup>142</sup> Committee on Women's Rights and Gender Equality, *Report on implementation of the Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims from a gender perspective* (2015/2118(INI)), 26 April 2016, p. 8.

<sup>143</sup> Council of Europe, *Ready for future challenges - Reinforcing the Council of Europe - Report by the Secretary General for the Ministerial Session in Helsinki, 16-17 May 2019*, CM-Public SG (2019) 1 01/04/2019, p. 29; Directorate General for External Policies of the Union, *Study on Contemporary forms of slavery*, (December 2018), p.6.

<sup>144</sup> Nicholson (2010), *supra* n.124, p. 714.

<sup>145</sup> Nicholson (2010), *supra* n.124, p. 714.

redress as they would be ‘unable to identify whether their treatment would engage the relevant legal provisions.’<sup>146</sup> Ultimately, Nicholson concedes that seeking conceptual clarity does not necessarily require an expansive interpretative approach that acts as a “catch-all” category, but rather a ‘consensus on what the definition is so that it may be interpreted consistently.’<sup>147</sup>

One obstacle to achieving a consensus on definition is the lack of State engagement with the existing international instruments that legally define various forms of exploitation.<sup>148</sup> Such a situation prevails despite obligations on States to criminalise human trafficking in domestic law. Stoyanova argues that many states have failed to fulfil this obligation since they have perpetuated legal uncertainty by ‘directly cop[ying] the international definition of human trafficking and/or the human rights definitions of slavery, servitude and forced labour, without further establishing the elements of the crimes at domestic level.’<sup>149</sup> The UNODC warned in 2009 that a lack of engagement with substantive clarification in law leads to a failure to prioritise and ineffective implementation of actions and measures to combat exploitation.<sup>150</sup>

For some scholars and practitioners, the legal uncertainty caused by a lack of legal definition and legal certainty of exploitation is not of crucial importance. Instead, the value of the law lies in the need to have, as Plant suggests, ‘strong laws against coercive exploitation, vigorously enforced, covering all human beings including nationals and migrant workers.’<sup>151</sup> This thesis refutes such a position on three counts. First, the impact of ambiguous legal definitions means that there can be, as Plant himself indicates, difficulties in ‘persuading a jury that these subtle forms of coercion and deception can make up the criminal offences of forced labour or labour trafficking.’<sup>152</sup> Second, as will be seen in the following chapters, the distinction in law between trafficking for the purposes of labour exploitation and other standalone forms of labour exploitation such as forced labour, is important to make – especially as labour exploitation can occur in the absence of human trafficking. Furthermore, dismissing the

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<sup>146</sup> Nicholson (2010), *supra* n.124, p. 714.

<sup>147</sup> Nicholson (2010), *supra* n.124, p. 714.

<sup>148</sup> Nicholson (2010), *supra* n.124, p. 715.

<sup>149</sup> Stoyanova (2014), *supra* n.108, p. 407.

<sup>150</sup> UNODC, Global report on trafficking in persons 2009, p. 134.

<sup>151</sup> Plant, R., ‘Foreword’, in Andrees, B., & Belser, P., (eds) *Forced Labour: Coercion and Exploitation in the private economy*, (New York: Lynne Reiner Publishers, 2009), p. xi.

<sup>152</sup> Plant (2015), *supra* n.70, p. 155.

importance of legally distinguishing between all forms of exploitation fails to take into account the possibility that some forms of exploitation may, at one time or another, be marginalised due to increased political focus, attention and engagement with another form of exploitation. Finally, this thesis posits that different forms of exploitation require different responses; therefore a “one size fits all” approach will not work .

The lack of legal certainty is problematic when adjudicating on the issue in court.<sup>153</sup> Therefore, a narrow approach has emerged that may be favoured by juries, judges and prosecutors as, this way, legal certainty may be best achieved by ensuring consistency in application of the law. In juxtaposition to this, and as we will discuss in Section 3 of Chapter 4, an alternative broader expansionist approach has been adopted by those who are not as bound by legal principles such as legal certainty e.g. scholars, activists and campaigners. A more comprehensive discussion of expansionist discourse will follow, however for now, in agreement with Pope, this thesis contends that, ‘legal certainty is required, as a result of the complexity of such an issue, which impacts upon the whole process and actors involved at all stages.’<sup>154</sup> This position has been reinforced by David who advocates that ‘definitions—and differences between terminology—are the foundation of a justice system that serves all: the community and, those most affected, victims of the crime.’<sup>155</sup> With this in mind, the following section will begin to examine the judicial handling and application of such an undefined and broad legal concept in human trafficking jurisprudence.

### **3. Judicial interpretation of the legal parameters of labour exploitation in human trafficking**

So far, the present chapter has presented the handling of human trafficking in international and regional law (Section 1) and the implications of a categorical rather than definitive approach to exploitation (Section 2). In this section and in subsequent chapters, the role of the judiciary as a conduit for legal clarity of the legal parameters of labour exploitation is examined.

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<sup>153</sup> Pope, J., ‘A free labor approach to human trafficking’, (2010) *University of Pennsylvania Law Review*, 158, 1849- 1875, p. 1855-1856.

<sup>154</sup> Pope (2010), *supra* n.153, p. 1855.

<sup>155</sup> David, F., ‘When it Comes to Modern Slavery, do Definitions Matter?’, (2015) *Anti-Trafficking Review* issue 5, 150– 152, p. 151.



The judicial interpretation of laws is of crucial importance to the understanding and further elaboration of undefined concepts, such as exploitation. Whilst this thesis recognises that increased attention to exploitation will facilitate a common understanding and harmonisation,<sup>156</sup> we reinforce the claim that increased attention to the topic will only be effective if it is accompanied by legal clarification that enables the identification of labour exploitation in practice.<sup>157</sup>

The European Court of Human Rights (ECtHR) case law will be prevalent in the subsequent judicial analysis. The rationale for adopting a predominantly Euro-centric judicial lens is twofold: first, apart from one case in the Inter-American Court of Human Rights that we will discuss in Chapter 2,<sup>158</sup> no other supranational bodies - including African Court of Justice and Human Rights<sup>159</sup> and UN Treaty bodies - have adjudicated upon State responsibility for the prohibition of human trafficking; secondly, the case studies in Part III of this thesis will focus on two European States that are bound by the European Convention on Human Rights. It must be noted that the specific focus on the Council of Europe instruments is also due to the fact that there has been no case law before the Court of Justice of the European Union on the interpretation of Directive 2011/36/EU.

In recent years, the ECtHR has increasingly engaged with Article 4 that prohibits (but does not define) slavery, servitude, forced and compulsory labour:

1. *No one shall be held in slavery or servitude.*
2. *No one shall be required to perform forced or compulsory labour.*
3. *For the purpose of this Article the term “forced or compulsory labour” shall not include:*
  - (a) *any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;*

<sup>156</sup> Gallagher (2008), supra n.55; Edwards (2007-2008), supra n.9, p. 14.

<sup>157</sup> Rijken (2013) supra n.56, p. 14; J Balch (2013), supra n.342, p. 29; FRA (2015), supra n.45, p. 15, p.39, p. 42.

<sup>158</sup> Inter-American Court of Human Rights, *Hacienda Brasil Verde Workers v. Brazil* (20 October 2016).

<sup>159</sup> Notwithstanding the issue is on the radar of the African Commission on Human and People's Rights, *Press Release on the Trafficking in Persons and Slavery in Libya*, 22 November 2017, available at: <http://www.achpr.org/press/2017/11/d374/>.

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.

As can be ascertained from the text of the provision itself, there is no mention of human trafficking. Thus, of particular interest to the present thesis, is the judicial application of the “living instrument doctrine.” In 2010, in the judgment of *Rantsev v Cyprus and Russia* the ECtHR held that ‘[human] trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention.’<sup>160</sup> Whilst the case law is embryonic in nature, this thesis follows Milano’s statement that the ECtHR’s Article 4 jurisprudence ‘provides unique guidance not only to States—members but also non-members of the Council of Europe—on how international law standards are being interpreted, and will inevitably have an impact on the future case law of other international bodies.’<sup>161</sup>

The ECtHR adopts a two-pronged approach to adjudicating Article 4: i) what is materially prohibited under the provision and ii) which positive obligations are Council of Europe member States’ under in relation to the prohibited practices?<sup>162</sup> In this thesis, the principal object of enquiry will be the former. We will assess the extent to which, if at all, jurisprudence further clarifies the material scope of the “purpose” of the human trafficking crime (present chapter). The remainder of the analysis in Part I will determine the degree to which a judicial understanding of exploitation beyond the

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<sup>160</sup> *Rantsev v. Cyprus and Russia*, 7 January 2010, Application No. 25965/04, para 282.

<sup>161</sup> Milano, V., ‘The European Court of Human Rights’ Case Law on Human Trafficking in Light of *L.E. v Greece: A Disturbing Setback?*’, (2017) *Human Rights Law Review* 17, 701–727, p.702.

<sup>162</sup> For more discussion on the analytical framework of judicial assessment of Article 4 cases see Milano (2017), supra n.161, p.704 and Pati, R., ‘States’ Positive Obligations with Respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in *Rantsev v. Cyprus & Russia*’, (2011) *Boston University International Law Journal*, 29, 79-142.

For explanation of ECtHR analytical framework of a definitional stage and application stage see Stoyanova, V., *Human trafficking and slavery reconsidered conceptual limits and states’ positive obligations in European Law*, (Cambridge: Cambridge University Press, 2017), p219.

For discussion on adjudication of Article 4 and positive obligations see Stoyanova (2012) supra n.121; Stoyanova (2014), supra n.108; Weatherburn, A., ‘Strengthening action to end forced labour: the new International Labour Organisation Protocol of 2014 to the Forced Labour Convention, 1930 and the positive human rights obligations of states,’ in De Hert, P., Smis, S., & Holvoet, M., (eds) *Convergences and Divergences Between International Human Rights Law, International Criminal Law and International Humanitarian Law* (Intersentia, June 2018).

context of human trafficking exists, namely the listed prohibited practices in Article 4: slavery, servitude and forced or compulsory labour (Chapters 2 & 3).

For now, the remainder of this section analyses - in the context of Article 4 - the ECtHR's assessment of human trafficking (*Rantsev v Cyprus & Russia* [2010]). What emerges is the Court's limited assessment of exploitation and subsequent contribution to the conflation of the concept. Indeed, in respect of subsequent cases referring to Article 4 and human trafficking, the Court has provided limited clarification of exploitation in two cases (*M & Others v Italy & Bulgaria* [2012], *Chowdhury v Greece* [2017]).

The case of *Rantsev v Cyprus & Russia* [2010]<sup>163</sup> does not provide clarification of the forms of exploitation in human trafficking. Instead the ECtHR focused upon the examination of 'the extent to which trafficking itself may be considered to run counter to the spirit and purpose of Article 4 of the Convention such as to fall within the scope of the guarantees offered by that Article without the need to assess which of the three types of proscribed conduct are engaged by the particular treatment in the case in question.'<sup>164</sup> The rationale for this was threefold:

- i) the Convention's special feature as a living instrument which must be interpreted in the light of present-day conditions;<sup>165</sup>
- ii) in order to ensure that the object and purpose of the Convention as an instrument for the protection of individual human beings, requires that its provisions be interpreted and applied so as to make its safeguards practical and effective and;<sup>166</sup>
- iii) the increasing recognition at international level of the prevalence of trafficking and the need for measures to combat it, as evidenced by the adoption of the Palermo Protocol in 2000 and the Council of Europe Anti-Trafficking Convention in 2005.<sup>167</sup>

By failing to consider the legal distinctions between various types of

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<sup>163</sup> *Rantsev* [2010], supra n.160.

<sup>164</sup> *Rantsev* [2010], supra n.160, para 279.

<sup>165</sup> *Rantsev* [2010], supra n.160, para 277.

<sup>166</sup> *Rantsev* [2010], supra n.160, para 275.

<sup>167</sup> *Rantsev* [2010], supra n.160, para 278.

exploitation, be it forced or compulsory labour, servitude or slavery, the Court immediately fell into the legal quagmire that has been left by the lack of definition of exploitation; conflating the process of human trafficking with slavery as highlighted in Section 2.1. At no point did the Court elaborate upon the exact form of exploitation that had been intended or in fact occurred, (in accordance with Article 3(3) of the Palermo Protocol) but instead, simply assimilated human trafficking with slavery:

*The Court considers that **trafficking in human beings**, by its very nature and aim of exploitation, is **based on the exercise of powers attaching to the right of ownership**. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere (see paragraphs 101 and 161 above). It implies close surveillance of the activities of victims, whose movements are often circumscribed (see paragraphs 85 and 101 above). It involves the use of violence and threats against victims, who live and work under poor conditions [emphasis added].<sup>168</sup>*

Furthermore, the Court concluded that:

*In view of its obligation to interpret the Convention in light of present-day conditions, **the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes “slavery”, “servitude” or “forced and compulsory labour”**. Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention [emphasis added].<sup>169</sup>*

Significantly, the position of the Court has been reiterated in subsequent cases. In *M & Others v Italy & Bulgaria* [2012], the Court affirmed the *Rantsev* assimilation of human trafficking with slavery.<sup>170</sup> More recently, in *SM v Croatia* [2018], the Court followed *Rantsev*, stating that it is unnecessary to examine the scope and meaning of human trafficking for sexual exploitation against the three prohibited practices of Article 4.<sup>171</sup>

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<sup>168</sup> *Rantsev* [2010], supra n.160, para 281.

<sup>169</sup> *Rantsev* [2010], supra n.160, para 282.

<sup>170</sup> *M & Others v Italy & Bulgaria*, 31 July 2012, Application no. 40020/03, para 151.

<sup>171</sup> *S.M. v. Croatia* 19 July 2018, Application no. 60561/14, para 54.

On the one hand, as put forward by McGeehan, such an approach may be viewed as a rejection of the normative hierarchy implied by the text of the European Convention, which is predicated on the existence of three distinct practices and, when strictly applied, affords greater normative strength to the prohibitions on slavery and servitude, than to the prohibition on forced labour.<sup>172</sup> On the other hand, as Allain emphasises, the approach by the Court is too simplistic, as it fails to take into account the three constituent elements that, when all present, constitute the crime of trafficking. Notably, the requirement ‘to recruit, transport, transfer, harbour or receive persons’ that must be linked to the “means” of ‘threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.’ Furthermore, by making reference to previous jurisprudence that solely dealt with slavery, the Court’s assimilation of the crime of human trafficking with slavery means that the remaining “purpose” elements are excluded from the scope of Article 4, namely, the prostitution of others or other forms of sexual exploitation, forced labour or services, practices similar to slavery, servitude or the removal of organs.<sup>173</sup>

The *Rantsev* judgment highlights the ECtHR’s unwillingness to consider the normative value of the three distinct concepts that are prohibited under Article 4: a position that has received criticism from legal scholars such as Keane who perceive the main legal issue to be that of the conditions of the artiste visa regime and the accountability of the State in facilitating an immigration regime that led to the abuses endured by Ms Rantseva which ultimately led to her death.<sup>174</sup> In this regard, as Stoyanova writes, a focus upon the actual abuses prohibited under Article 4 would have been a preferred alternative, in order to determine a classification between the three categories: the slavery, servitude or forced labour.<sup>175</sup> An indication of the practice to which the victim had been subjected might have provided clearer guidance on the precise legal nature of trafficking from the perspective of the rights of the victims. Legal

<sup>172</sup> McGeehan, N., ‘Misunderstood and neglected: the marginalisation of slavery in international law’, (2012) *The International Journal of Human Rights* 16(3), 436–460, p. 441.

<sup>173</sup> Allain, (2010) *supra* n.58, p. 553–4; Allain, J., ‘Book Review, Silvia Scarpa, ‘Trafficking in Human Beings: Modern Slavery’, (2009) *European Journal of International Law*, 20 453–457, p. 454–455, the same argument is used when critiquing Scarpa’s book that contests that human trafficking is ‘a new form of slavery’ under the Palermo Protocol [2000] and the Council of Europe Anti-trafficking convention [2005].

<sup>174</sup> Keane, D., ‘Abolitionist in heart but not in action: slavery, servitude and the status of Article 4 ECHR in Irish law’, (2013) *Irish Jurist* 50, 166–198, p. 173–74.

<sup>175</sup> Stoyanova (2012) *supra* n.121, p. 164 Vijayarasa & Villarino (2012), *supra* n.58, p. 61.

scholars, including Milano, Piotrowicz, and van der Wilt, believe that the ECtHR's failure to stipulate exactly how human trafficking is a violation of Article 4 is a weakness and a sign of intellectual incoherence. Furthermore, to argue that human trafficking violates Article 4 without the need to explain exactly how, on the one hand shows flexibility, but on the other does not promote legal certainty.<sup>176</sup>

Alternatively, the Court could have adopted a different approach that applied the factual circumstances to 'the definition of slavery which requires exercise of "powers attaching to the right of ownership", in relation to the particular facts' of the case.<sup>177</sup> Such an alternative approach, proposes Stoyanova, would have resulted in a more progressive interpretation, that shifts the focus onto the regulatory framework of the visa regimes, such as the artiste visa, and requiring a more robust approach in order to address the vulnerability of migrant workers to certain abuses that led to the circumstances of the *Rantsev* case; not just in terms of sexual exploitation but also for other forms of exploitation experienced by migrant workers. A shift away from human trafficking would permit the space for the focus on the conditions of artistes and how the State-imposed regulations create susceptibilities to abuses. The focus would not be on the migration aspect and on whether women are engaged in prostitution; but on how to modify those regulations so that abuses by private parties are prevented.<sup>178</sup> This thesis supports this suggestion as such an approach would enlarge the scope of protection to those who are subjected to the forms of abuse proscribed in Article 4, and not just those who are victims of sexual exploitation.

Ultimately, the analysis of the *Rantsev* judgment raises a number of issues that are of critical value to this discussion of conflation and confusion in terminology, as well as with regards to the marginalisation of labour exploitation and the dominance of efforts to combat human trafficking, as will be seen in Chapter 4. First, the approach taken in *Rantsev* was so restricted to trafficking in human beings, that any expansion of Article 4's remit to include 'exploitation' would have been limited to 'exploitation which is linked with recruitment, transportation, transfer, harbouring or receipt of

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<sup>176</sup> Milano (2017), supra n.161, p.706; Piotrowicz (2012), supra n.58, p. 196. van der Wilt (2014), supra n.3, p. 312.

<sup>177</sup> Stoyanova (2012) supra n.121, p. 163.

<sup>178</sup> Stoyanova (2012) supra n.121, p. 177.

persons, by means of coercion or deception.’<sup>179</sup> Such a reading can be undesirable because it leads to a ‘privileging of “exploitation” as a purpose element of human trafficking over any type of “exploitation”’.<sup>180</sup> Second, and of vital significance to the discussion around the correct application of terminology, is the fact that the Court ‘referred to *Rantseva* as a victim of trafficking *or* exploitation.’<sup>181</sup> Such a formulation requires further examination, in light of the human trafficking definition: ‘was she a victim of exploitation within the context of trafficking, which requires linking the exploitation with certain ‘means’ and certain “actions”?’ Alternatively, was she simply a victim of exploitation, which demands the question whether the material scope of Article 4 is enlarged to such an extent as to cover any “exploitation”?’<sup>182</sup> Unfortunately, the Court, by virtue of its decision that it was unnecessary to identify whether the treatment constitutes “slavery”, “servitude” or “forced and compulsory labour”, did not offer further insight into these questions.

The *Rantsev* judgment is the upshot of a ‘Court [that] is not regularly called upon to consider the application of Article 4,’<sup>183</sup> therefore whilst the decision is significant it is also a source of disappointment for those seeking legal clarity.<sup>184</sup> Consequently, since the affirmation in *Rantsev* that human trafficking falls within the material scope of Article 4, there have been two subsequent cases of human trafficking for labour exploitation whereby the Court *directly* addressed the material scope and interpretation of the three prohibited practices, forced compulsory labour, servitude or slavery.<sup>185</sup> A more detailed analysis of the forms of exploitation discussed here are further examined in subsequent chapters; for now, a preliminary explanation of the cases is outlined.

In *M & Others v Italy & Bulgaria* [2012], the court held that there was insufficient evidence for the events complained of to constitute human trafficking. As to whether or not the applicants were held in slavery or forced or compulsory labour,

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<sup>179</sup> Stoyanova (2012) *supra* n.121, p. 172. On continued narrow approach adopted by the Court *after LE v Greece* [2016] Milano (2017), *supra* n.161, p. 727.

<sup>180</sup> Stoyanova (2012) *supra* n.121, p. 173.

<sup>181</sup> *Rantsev* [2010], *supra* n.160, para. 296.

<sup>182</sup> Stoyanova (2012) *supra* n.121, p. 173.

<sup>183</sup> *Rantsev* [2010], *supra* n.160, para. 279.

<sup>184</sup> van der Wilt (2014), *supra* n.3, p. 312; Gallagher (2010), *supra* n. 23, p. 189.

<sup>185</sup> There have been other cases adjudicated under Article 4, but the Court examined compliance with positive obligations in lieu of a further elaboration of the material scope of the prohibited practices in *LE v Greece* (2016) and *J & Others v Austria* (2017), see Milano (2017), *supra* n.161, 701–727,

the court referred to the marriage being in accordance with Roma traditions<sup>186</sup> and the exchange of money in the context of the alleged marriage, was not enough to conclude that there had been transfer of ownership.<sup>187</sup> Equally, the Court held that the applicants had not been required to perform forced or compulsory labour because they had been employed to do housework, in the absence of coercion, force or menace of penalty.<sup>188</sup>

In *Chowdhury v Greece* [2017], the Court held that the applicants had been victims of human trafficking for the purpose of forced or compulsory labour. When discussing the parameters of forced or compulsory labour and the restrictive domestic assimilation of human trafficking with servitude, the Court emphasised the distinction between servitude and forced or compulsory labour.<sup>189</sup> The Court stated that the key distinction between the two forms of labour exploitation is characterised by the victims' feeling that their condition was permanent and that the situation was unlikely to change.<sup>190</sup> In *Chowdhury*, the Court held that the applicants' status as undocumented seasonal workers would have emphasised such a feeling of lack of an alternative. Crucially, the Court emphasised that restriction of movement is not *sine qua non* for identifying forced or compulsory labour. Unlike the domestic courts, the Court did not consider the freedom of movement of the workers during leisure time sufficient enough to rescind the feeling that they had a choice to leave the exploitative situation. Indeed, the Court stressed that the precarious nature of their position – without a residence or work permit – and the non-payment of wages owed would have meant that they would have been left destitute had they decided to leave. Such precarity left them with no alternative but to continue working in such conditions.<sup>191</sup>

Ultimately, despite these two further cases, the ECtHR has still to determine whether or not Article 4 covers lesser forms of abuses than the potentially high standards established by the concepts of slavery, servitude and forced labour. Indeed, the *Chowdhury* case begins this judicial dialogue, but still within the realms of forced labour. Should the Court adopt such a progressive interpretation of Article 4 of the ECHR then, as Stoyanova correctly asserts, this could lead to the interpretation of

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<sup>186</sup> *M & Others* [2012], supra n.170, para 160. This will also be further discussed in the context of Chapter 8.

<sup>187</sup> *M & Others* [2012], supra n.170, para 161.

<sup>188</sup> *M & Others* [2012], supra n.170, para 162.

<sup>189</sup> *Chowdhury* [2017], supra n.100, para 99.

<sup>190</sup> *Chowdhury* [2017], supra n.100, para 99.

<sup>191</sup> *Chowdhury* [2017], supra n.100, para 95-97.



Article 4's material scope requiring a certain minimum level of severity, thus establishing a threshold of seriousness for exploitation.<sup>192</sup> However, as Shamir highlights, the role of the court would not end there. The Court would be subsequently required to provide further input in order to determine the exact parameters of such a threshold.<sup>193</sup> As we have demonstrated, the limited amount of jurisprudence thus far, and lack of engagement with such a reading of Article 4, suggests that such judicial developments are still far off.

#### 4. Concluding remarks

Following the international definition of human trafficking and the expansion of its scope to include labour exploitation, there has been an increased recognition of this form of trafficking at the supranational level (Section 1). However, there is still a lack of clarity regarding the scope of the exploitation concept as a result of a categorical, non-exhaustive, approach to the purpose element (Section 2). As a result, the lack of a definition of exploitation in human trafficking has led to a number of issues, namely a **conflation and confusion between the forms of exploitation, a fragmented and inconsistent** domestic implementation and a lack of **legal certainty**. This thesis claims that such problems can be overcome by developing a legal conceptualisation of labour exploitation that correctly identifies the common attributes of exploitation. Furthermore, we believe that a practical legal understanding will not negatively impact existing policy measures that are designed to tackle this problem but rather enhance their effectiveness.

Despite the problems raised in this chapter, there has been a shift towards greater recognition of exploitation. However, there is a lack of guidance and assistance from international and regional bodies (UN Treaty bodies and ECtHR) to ensure domestic application provides for legal certainty. Furthermore, the overview of the European Court of Human Rights Article 4 case law shows that the judicial engagement with human trafficking has not been very useful to date due to an aversion to providing clarification of the material scope of the provisions, instead preferring to address the positive obligations on States in relation to the prohibited practices (Section 3).

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<sup>192</sup> Stoyanova (2012) *supra* n.121, p. 185.

<sup>193</sup> Shamir, H., 'A labor paradigm for human trafficking', (2012) *UCLA Law Review* 60, 76 – 136, p. 85-86; Stoyanova (2012) *supra* n.121, p. 185.

The critical analysis of the transnational human trafficking definition and its application both formally and substantively does not seek to dismiss the achievements of measures aimed at countering human trafficking. Quite the opposite. Indeed, the developments in anti-trafficking law and policy are to be regarded, as Allain suggests as ‘a blueprint of the activities to be dealt with so as to suppress exploitation.’<sup>194</sup> This thesis suggests that efforts that seek to clarify the legal meaning of exploitation will strengthen the application of the prohibition of human trafficking.

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<sup>194</sup> Allain, (2010), *supra* n.58, p. 556.



## **CHAPTER 2 – State-of-the-art legal understanding of slavery, servitude and practices similar to slavery**

### **0. Introduction and structure of the chapter**

As we saw in Chapter 1, the established legal definitions of human trafficking list a number of forms of exploitation that had already been defined as standalone forms of exploitation in separate international and regional instruments, prior to the promulgation of the Palermo Protocol. In the first instance, we consider three of these standalone forms of exploitation: slavery (Section 1), practices similar to slavery and servitude (Section 2). Secondly, we analyse the international and regional jurisprudence that applies the international definition of these forms of exploitation (Sections 3 & 4). As in Chapter 1, the predominant focus is on the jurisprudence related to Article 4 of the European Convention on Human Rights, which as Keane writes was *a priori* ‘a long dormant provision’<sup>195</sup> but has increasingly been the focus of academic and legal commentary and judicial discourse ‘in light of the abuses to which migrants in host European countries are being subjected.’<sup>196</sup> Unlike Chapter 1, however, the discussion of the judicial interpretation of international and regional definitions of slavery and servitude also extends to other judicial bodies, including the International Criminal Tribunal for the former Yugoslavia (ICTY), the High Court of Australia, the ECOWAS

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<sup>195</sup> Keane (2013), *supra* n. 174, p. 168

<sup>196</sup> Stoyanova (2014), *supra* n. 108, p. 408.

Community Court of Justice and the Inter-American Court of Human Rights. The slavery case law analysis reveals a fluctuation between an expansive and narrow interpretation of the slavery definition that seeks to ensure that the “classical” definition of slavery is applicable in a contemporary setting with a shift away from ownership to an understanding premised upon the exercise of control (Section 3). The jurisprudence relating to servitude and practices similar to slavery has seen an engagement with a criterion based interpretation of the former non-legal concept rather than the categorical list of ‘practices similar to slavery’ that are enumerated in law (Section 4).

Overall, we demonstrate in this chapter the extent to which the discourse surrounding the legal understanding of slavery, practices similar to slavery and servitude can assist in conceptualising exploitation in law. We acknowledge that the prohibition of slavery recognises the extreme nature of this form of exploitation that must not be diluted, out of respect for and in recognition of the abhorrence of the historical transatlantic slave trade and societal acceptance of slavery. Without diminishing the historical importance of the prohibition of slavery, further clarification of its material scope is required in the context of a modern setting so as to ensure that individuals can seek access to justice. Whilst the international law definition appears to have endured the test of time, subsequent supranational legal reform and jurisprudence reflects the legal community’s recognition that the modern understanding of slavery must move beyond the limitations of a master-property relationship.

## **1. Slavery in international and regional law**

The abolition of the Transatlantic slave trade and the abolition of slavery must be distinguished. Whilst the former was finally legislated in 1807 in Great Britain with the Slave Trade Act and in the United States with the Act Prohibiting Importation of Slaves, the practice of holding another in a position of slavery continued with an incremental approach to its abolition across the British Empire (1833) in the US (1865) and across Europe (early 20<sup>th</sup> century).<sup>197</sup> An international approach to the suppression of both the slave trade and slavery came to fruition with the entry into force of the League of

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<sup>197</sup> Craig, G., Balch, A., Lewis, H., & Waite, L., ‘Editorial Introduction: the modern slavery agenda: political, politics and practice’ in Craig, G., Balch, A., Lewis, H., & Waite, L., (eds) in *Modern slavery agenda: Policy, politics and practices in the UK* (Policy Press: 2019), p. 6.

Nations International Convention to Suppress the Slave Trade and Slavery, 1926. Therein, Article 1(1) defines slavery as:

*The status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.*<sup>198</sup>

The international definition has, according to Allain, been widely accepted,<sup>199</sup> and is recognised as having the status of customary international law and *jus cogens*.<sup>200</sup> Very much like other fundamental rights such as the right to life and freedom from torture, States must not only refrain from infringing freedom from slavery (a negative right), they must also take measures to prevent its violation (a positive right). For example, Article 2 of the 1926 Slavery Convention requires:

*The High Contracting Parties undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, so far as they have not already taken the necessary steps:*

*(a) To prevent and suppress the slave trade;*

*(b) To bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.*<sup>201</sup>

Furthermore, Article 5 of the same convention obliges State parties to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.<sup>202</sup>

Whilst the absolute prohibition of slavery and the slave trade was overshadowed in the Convention by wording such as “progressive” and “suppress,” the position of the international community in supporting an absolute prohibition was made explicit in Article 4 of the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948, which emphatically states that:

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<sup>198</sup> Article 1(1), International Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253.

<sup>199</sup> Allain, J., ‘The Legal Definition of Slavery into the Twenty-First Century’, in Allain, J., (ed), *The Legal Understanding of Slavery: From the Historical to the Contemporary*, (Oxford: Oxford University Press, 2012), p. 199.

<sup>200</sup> Piotrowicz (2012), supra n.58, p. 183; Gallagher (2009), supra n.140, p. 807.

<sup>201</sup> Article 2, International Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253.

<sup>202</sup> Article 1(1), International Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253.

*No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.*<sup>203</sup>

Whilst the Declaration is non-binding, it set the tone for subsequent binding iterations of the prohibition in international and regional human rights treaties wherein the absolute and non-derogable prohibition of ‘slavery in all its forms’ has been reinforced:

- Article 4 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950): *‘No one shall be held in slavery or servitude.’*
- Article 8 (1) of the International Covenant on Civil and Political Rights (1966): *‘No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited.’*
- Article 5 of the African Charter on Human and Peoples’ Rights (1981): *‘Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.’*
- Article 6 (1) of the American Convention on Human Rights (1969): *‘No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.’*
- Article 5 (1) of the Charter of Fundamental Rights of the European Union (2000): *‘No one shall be held in slavery or servitude.’*

The eradication of slavery is one of only two human rights identified by the International Court of Justice as carrying obligations *erga omnes*;<sup>204</sup> that is, an obligation owed by States to the international community as a whole.<sup>205</sup> More recently, Article 7(1)(c) of the Rome Statute of the International Criminal Court (1998), which entered into force in 2002, proscribes enslavement as a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.<sup>206</sup> Article 7(2)(c) defines enslavement in the

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<sup>203</sup> Article 4, Universal Declaration of Human Rights, 10 December 1948 217 A (III).

<sup>204</sup> ICJ, *Barcelona Traction (Belgium v Spain)*, 1970, I.C.J.3 (5 February 1970), paras 33-34.

<sup>205</sup> Hathaway, J. ‘The Human Rights Quagmire of “Human Trafficking,”’ (2008) *Virginia Journal of International Law* 49(1), 1-59, 7-8.

<sup>206</sup> Article 7(1)(c), United Nations, *Rome Statute of the International Criminal Court*, 1998, UN Doc. A/CONF. 183/9; UNTS, Vol. 2187, p, 90.

same way as slavery in the 1926 Convention as ‘the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.’<sup>207</sup> The Statute further proscribes sexual slavery as a crime against humanity in Article 7(1)(g) and a war crime in Article 8(2)(b)(xxii).

Whilst these subsequent international and regional instruments affirmed the absolute nature of the prohibition of slavery, no further insight is offered as to the meaning of the definition of slavery. Thus, whilst the 1926 Convention remains the point of reference,<sup>208</sup> it unfortunately perpetuates some confusion as to the exact meaning of slavery, as the concept of “powers attached to the right of ownership” is not defined. The Convention’s *travaux préparatoires* provide an indication as to the characteristics of the various powers that are deemed to attach to the right of ownership:

- 1) *The individual of servile status may be made the object of a purchase;*
- 2) *The master may use the individual of servile status, and in particular, his capacity to work, in an absolute manner, without any restriction other than that which might be expressly provided by law;*
- 3) *The products of labour of the individual of servile status become the property of the master without any compensation commensurate to the value of the labour;*
- 4) *The ownership of the individual of servile status can be transferred to another person;*
- 5) *The servile status is permanent, that is to say, it cannot be terminated by the will of the individual subject to it;*
- 6) *The servile status is ipso facto to descendants of the individual having such status.*<sup>209</sup>

The intended understanding of the definition of slavery was to be expansive and comprehensive. Indeed, the drafters of the 1926 convention displayed considerable

<sup>207</sup> Article 7(2)(c), United Nations, *Rome Statute of the International Criminal Court*, 1998, UN Doc. A/CONF. 183/9; UNTS, Vol. 2187, p. 90.

<sup>208</sup> See European Court of Human Rights, *Guide on article 4 of the convention - prohibition of slavery and forced labour*, 2nd Edition, 2014. Paras 6 & 12; See also reference to 1926 Slavery Convention in *Siliadin* [2005], supra n.129, para 122; See reference Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery in *C.N. and V. v. France*, 11 October 2012, Application No. 67724/09, para 90.

<sup>209</sup> UN Economic and Social Council, *Slavery the slave trade and other forms of servitude* (Report of the Secretary-General) UN Doc. E/2357, 27 January 1953, pp. 26-28 cited in Allain, J., *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, (Leiden: Martinus Nijhoff Publishers, 2008), p. 496-498.



ambition in attempting to outline a broad understanding of ‘slavery in all its forms’ but unfortunately, had a poor grasp of the exact nature of the practices they sought to combat. Consequently, the construction of the definition is paradoxical, as highlighted by scholars including McGeehan and Vijayarasa & Villarino. On the one hand, its application to ‘slavery in all its forms’ led to various interpretations and a wide range of practices subsumed as slavery.<sup>210</sup> On the other hand, following the inclusion of the phrase “powers attached to the right of ownership” concerns have been raised that certain exploitative conditions could in fact be excluded where there was no evidence of a master-property relationship.<sup>211</sup>

The concerns raised in more contemporary scholarship are not new, as can be seen by the establishment of an Ad Hoc Committee of Experts on Slavery in 1949, whose task was to address concerns as to the satisfactory nature of the 1926 legal definition of slavery. The Committee who tabled two proposals to draft: i) either a new convention broader in scope or; ii) a supplementary instrument to the existing convention.<sup>212</sup> The second proposition was approved with a view to affirming ‘the slavery convention of 1926 as a whole and to be more precise in defining the exact forms of servitude dealt with.’<sup>213</sup> At the time, such a position was consistent with the inclusion of servitude as a prohibited practice in Article 4 of the newly promulgated UDHR. Both developments acknowledged the fact that the definition of slavery does not adequately capture all forms of exploitation, in particular those that do not meet the legal threshold of the “exercise of powers attaching to the right of ownership.” The extent to which subsequent legal instruments achieved this objective is discussed in the next section.

## **2. Practices similar to slavery and servitude in international and regional law**

The supplementary convention recommended by the aforementioned Ad Hoc Committee of Experts on Slavery sought to cover the full range of practices related to slavery that were not covered by the 1926 Convention. Article 1 of the Supplementary

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<sup>210</sup> McGeehan (2012), *supra* n. 172, p. 452-453.

<sup>211</sup> Vijayarasa & Villarino (2012), *supra* n.58, p. 56.

<sup>212</sup> UN Economic and Social Council, *Report of the ad hoc Committee on Slavery (second session)*, E/RES/388(XIII), 10 September 1951, cited in Allain (2008), *supra* n.209, p. 494.

<sup>213</sup> Allain (2008), *supra* n.209, p. 212.

Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956 did not amend the legal definition of slavery as it had been accepted as an ‘accurate and adequate definition of the term.’<sup>214</sup> Instead, the provision updated the law by extending, in Article 1, the applicability of the convention to four additional ‘institutions or practices similar to slavery’ (hereinafter ‘practices similar to slavery’):

*Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery Convention signed at Geneva on 25 September 1926:*

*(a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;*

*(b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;*

*(c) Any institution or practice whereby:*

*(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or*

*(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or*

*(iii) A woman on the death of her husband is liable to be inherited by another person;*

*(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.*<sup>215</sup>

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<sup>214</sup> UN Economic and Social Council, *Report of the ad hoc Committee on Slavery (second session)*, E/RES/388(XIII), 10 September 1951, cited in Allain (2008), *supra* n.209, p. 494.

<sup>215</sup> Article 1, *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, Geneva, 7 September 1956, UNTS, vol. 266, p. 3.

Article 1 is the central feature of the Supplementary Convention providing for an exhaustive, categorical list of forms of exploitation that constitute ‘practices similar to slavery’: namely, debt bondage, serfdom, forced marriage and child exploitation. Importantly, despite the prohibition of servitude in the aforementioned Article 4 of the UDHR,<sup>216</sup> the drafters of the Supplementary Convention replaced servitude by the legal term ‘institutions or practices similar to slavery.’ Consequently, servitude remains undefined in international law.<sup>217</sup> The main justification for this omission was that servitude was to be considered as a form of forced labour rather than slavery, ‘which would more appropriately be dealt with as such by the International Labour Organisation, or kinds of civic obligations which are generally accepted and in no way resemble slavery in their effects.’<sup>218</sup>

Such a distinction was not made in the drafting process of the International Covenant on Civil and Political Rights (ICCPR), wherein Article 8 of the ICCPR introduced a legally binding absolute prohibition of servitude, with no reference to ‘practices similar to slavery.’<sup>219</sup> During the drafting process, it was agreed that “slavery” and “servitude” were two different concepts and should be dealt with in two separate paragraphs. Servitude was perceived as ‘a more general idea covering all possible forms of man's domination of man’ whereas slavery was considered to constitute ‘the worst form of bondage [...] which tended to reduce the dignity of man.’<sup>220</sup> Ultimately, the prohibition of servitude, involuntary or otherwise, sought to secure the impossibility for any person to contract himself into bondage.<sup>221</sup>

Whilst the side-lining of servitude in law could have created fragmentation in public international law and international human rights law, Allain highlights that subsequent legal instruments appear to have overcome the situation by simply referring to both ‘practices similar to slavery’ and ‘servitude.’<sup>222</sup> For example, both international and regional definitions of human trafficking refer to both practices similar to slavery

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<sup>216</sup> Article 4, *Universal Declaration of Human Rights*, 10 December 1948 217 A (III)

<sup>217</sup> McGeehan (2012), *supra* n. 172, p. 437; Allain, J., ‘On the curious disappearance of human servitude from general international law’, (2009) *Journal of the History of International Law* 11, 303-332, p. 304.

<sup>218</sup> Allain (2008), *supra* n.209, p. 522.

<sup>219</sup> Suggestions of replacing servitude with “peonage and serfdom” were rejected, UN General Assembly *Draft International Covenant on Human Rights, Annotation, prepared by the Secretary General*, tenth session UN/GA/A/2929 (1 July 1955), para 18, p. 92.

<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid.*

<sup>222</sup> Allain (2009), *supra* n.217, p. 330-331.

and servitude. However, since the term servitude remains undefined different interpretations have emerged in practice. On the one hand, servitude is considered to be synonymous with ‘practices similar to slavery’ and by virtue of the exhausted categorisation of ‘practices similar to slavery’ in the 1956 convention. Thus, for Allain, this requires the normative content of servitude in international law to be narrowly construed in its application.<sup>223</sup> On the other hand, Gallagher claims that servitude is interpreted as broader than slavery which is restricted to the legal ownership of another person, referring to ‘all conceivable forms of domination and degradation of human beings by human beings’<sup>224</sup> and to ‘less far- reaching forms of restraint and refers, for instance, to the total of the labour conditions and/or the obligations to work or to render services from which the person in question cannot escape and which he cannot change.’<sup>225</sup> This hierarchical approach to slavery, servitude and practices similar to slavery has been affirmed in jurisprudence, as will be discussed below (Section 3).

The categorical approach to distinguishing between slavery, servitude and the practices that amount to slavery has been criticised as it has focused upon existing practices rather than identifying the common attributes of the different manifestations of slavery. Much of the subsequent confusion concerning what is and what is not slavery, according to Bales & Robbins, springs from this separation of the practical and the conceptual.<sup>226</sup> This point is further reiterated by McGeehan who emphasises that:

*The collective failure to recognise slavery’s ability to manifest in forms other than chattel slavery has undermined attempts to abolish it by legal means, and has created confusion at the highest level in the legal discourse.*<sup>227</sup>

Allain proposes that the extent to which this is problematic in practice may be mitigated by the possibility of a duality of the characterisation of a situation. For instance, a particular factual situation may constitute, on the one hand, ‘servitude, if it meets the definitional threshold set out in international law e.g. debt bondage.’ Concurrently, the same factual situation may also constitute slavery, ‘if beyond meeting

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<sup>223</sup> Allain (2013), supra n.1, p.202.

<sup>224</sup> Gallagher (2008), supra n. 55, footnote 31 & 32.

<sup>225</sup> Gallagher (2008), supra n. 55, footnote 33.

<sup>226</sup> Bales, K., & Robbins, P., “No-one shall be held in slavery or servitude”: A critical analysis of international slavery agreements and concepts of slavery’, (2001) *Human Rights Review* 2(2), 18-45, p. 22.

<sup>227</sup> McGeehan (2012), supra n. 172, p. 436

the definitional threshold of a specific servitude; it also manifests the exercise of powers attaching to a right of ownership.’<sup>228</sup> Allain’s promulgation of the duality of circumstances will be further discussed in subsequent chapters (see Chapter 3).

The continued reference to the 1926 Convention definition reinforces the necessity of a situation of slavery to be characterised by the “exercise of powers attached to the rights of ownership.” Consequently, the 1956 Supplementary Convention is deemed to apply to situations where such powers are not present.<sup>229</sup> As such, Allain concludes that practices similar to slavery and servitude should be understood as human exploitation falling short of slavery.<sup>230</sup> However, despite the recognition that the presence of the “exercise of powers attaching to the right of ownership” constitutes slavery and the lack of said powers points to a lesser form of exploitation i.e. servitude, the traditional definition of slavery is *contradictio in terminis*, as it is universally recognised that one person cannot have a legal right of ownership over another person.<sup>231</sup> Therefore, with this in mind, it is important to turn to the most recent jurisprudential engagement to determine the extent to which the legal definition of slavery, practices similar to slavery and servitude have been interpreted in a contemporary setting.

### **3. Judicial interpretation of the legal parameters of slavery: moving towards a contemporary understanding**

Unlike the human trafficking case law analysis in Chapter 1, this chapter does not only consider the case law of the European Court of Human Rights, but also the engagement of other relevant international, regional and national judicial bodies with the concepts discussed above: including, *inter alia* the International Criminal Tribunal for the former Yugoslavia (ICTY), the Australian High Court, the ECOWAS Community Court of Justice and the Inter-American Court of Human Rights. The inclusion of this analysis will demonstrate that the conceptualisation of slavery, practices similar to slavery and servitude by these judicial bodies is radically different from the approach taken by the

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<sup>228</sup> Allain (2013), *supra* n.1, p.144.

<sup>229</sup> Allain (2008), *supra* n.209, p. 60.

<sup>230</sup> Allain (2009), *supra* n.217, p. 304.

<sup>231</sup> Rijken (2013), *supra* n.56, p. 17.

European Court of Human Rights.<sup>232</sup> The slavery case law analysis reveals a fluctuation between an expansive and narrow interpretation of the slavery definition wherein the judicial understanding grapples with a “classical” definition of slavery and its applicability to a contemporary setting.

Despite, the prohibition of slavery in international law since 1926, the concept of slavery has been subject to very limited judicial interpretation. One of the occasions in which there was judicial engagement with the concept was in 2002, under the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v Dragoljub Kunarac, Radomir Kovac & Zoran Vukovic* [2002] immediately following the entry into force of the Rome Statute. The ICTY attempted to determine what van der Wilt calls ‘the proper limits of the crime of enslavement’<sup>233</sup> and in doing so took an interpretive approach that focused upon “factors” that would provide assistance in determining whether or not a particular situation amounts to enslavement. Following the ICTY’s broad interpretation of contemporary forms of slavery in *Kunarac*, the first subsequent critical engagement of the European Court of Human Rights with the parameters of slavery under Article 4 saw the Court offer a contradictory interpretation of the meaning of “powers attaching to the right of ownership”, in *Siliadin v France* [2005].

The position of the European Court was followed by the ECOWAS Community Court of Justice in *Hadijatou Mani v. Republic of Niger* [2008], which was characterised by enslavement amounting to “chattel slavery” by virtue of the applicant being born into an established slave class.<sup>234</sup> In the same year, the Australian High Court sought to further clarify the exact parameters of slavery according to the 1926 definition in conformity with international law in *R v Tang* [2008].<sup>235</sup> Bearing in mind the gravity of the non-derogable prohibition of slavery as a grave international crime, the Australian High Court sought to ensure that the definition is not interpreted too broadly so as to capture other exploitative practices that fall short of slavery, *per se*.<sup>236</sup>

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<sup>232</sup> McGeehan (2012), *supra* n. 172, p. 349.

<sup>233</sup> van der Wilt (2014), *supra* n.3, p. 304.

<sup>234</sup> *Hadijatou Mani* [2008] *supra* n.67, para 9 [unofficial translation].

<sup>235</sup> van der Wilt (2014), *supra* n.3, p. 312; Allain (2009), *supra* n.138, p. 246.

<sup>236</sup> *The Queen v Tang* [2008] HCA 39, August 28, 2008 M5/2008, para.111; Tully (2010), *supra* n.138, p. 414; Allain (2009), *supra* n.138, p. 255.

More recently, the Inter-American Court of Human Rights in *Hacienda Brasil Verde Workers v Brazil* [2016] delivered a judgment on the prohibition of slave labour under Article 6 of the American Convention on Human Rights. The Court held that slavery, in a contemporary setting, must be understood to refer to both the *de jure* and *de facto* situation or condition of the victim as well as the exercise of powers attaching to the right of ownership.<sup>237</sup>

Three points of interest have emerged from the handling of slavery in the abovementioned cases. The first refers to the placing and interpretation of slavery in a contemporary setting and the extent to which the concept is to be understood in an expansive manner, beyond the traditional understanding of chattel slavery, that is characterised by the reduction of an individual to an object (Section 3.1). Secondly, the courts have however acknowledged that the property paradigm of slavery is *contradictio in terminis* in light of the legal impossibility of “right of ownership” (Section 3.2). Therefore, the third point, following on from the first two, refers to the need to clarify the material scope of “any or all of the powers” of ownership that can enable a contemporary interpretation of slavery that is premised upon control (Section 3.3).

### **3.1 Slavery in a contemporary setting: moving beyond chattel slavery?**

Despite the Rome Statute’s reference to the 1926 Convention definition, the ICTY Appeals Chamber in *Prosecutor v Dragoljub Kunarac, Radomir Kovac & Zoran Vukovic* [2002] held that slavery is no longer limited to the notion of “chattel slavery”:

*The Appeals Chamber accepts the chief thesis of the Trial Chamber that the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as “chattel slavery”, has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with “chattel slavery”, but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical*

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<sup>237</sup> *Hacienda Brasil Verde* [2016], supra n. 158.

*personality; the destruction is greater in the case of “chattel slavery” but the difference is one of degree. The Appeals Chamber considers that, at the time relevant to the alleged crimes, these contemporary forms of slavery formed part of enslavement as a crime against humanity under customary international law.*<sup>238</sup>

In stark contrast, the European Court later ruled, in *Siliadin v France* [2005], that a traditional definition of slavery should be adopted under Article 4; making explicit reference to the 1926 slavery convention and the exercise of powers attaching to a right of ownership. The European Court’s restrictive interpretation drew on the understanding of the different prohibited forms of exploitation in Article 4 as distinct concepts that descend in gravity, with slavery being the most severe, followed by servitude and forced or compulsory labour:

*The Court notes at the outset that, according to the 1927 Slavery Convention, “slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”. It notes that this definition corresponds to the “classic” meaning of slavery as it was practised for centuries.*<sup>239</sup>

The key distinction made in *Siliadin* [2005] was the emphasis placed on the “classic” meaning of slavery leading to an overly restrictive interpretation. To this end, such an interpretation requires that for a person to be held in slavery “in the proper sense” then an individual must ‘exercise a genuine legal right of ownership over her, thus reducing her to the status of an “object”’.<sup>240</sup> The ECOWAS Community Court of Justice in *Hadijatou Mani v. Republic of Niger* [2008] followed the European Court’s position, ruling that the moral element of the slave condition was demonstrated by the intention to exercise property rights over the applicant.<sup>241</sup>

The approach of the High Court of Australia in *R v Tang* [2008], in this regard, is similar to that of *Siliadin*, to the extent that the court restricted the interpretation of slavery so as to not to render slavery “virtually meaningless” by adopting an expansive

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<sup>238</sup> ICTY, *Prosecutor v Dragoljub Kunarac, Radomir Kovac & Zoran Vukovic*, Case No. IT-96-23& IT-96-23/1-A (12 June 2002), paras 117.

<sup>239</sup> *Siliadin* [2005], supra n.129, para 122. See also reference in para 123 of *Siliadin* to *Van Droogenbroeck v Belgium*, Commission’s report of July 9, 1980, Series B no. 44, p.30, paras 78-80 as discussed by Keane (2013), supra n. 174, p. 183.

<sup>240</sup> *Siliadin* [2005], supra n.129, para 122. See discussion in McGeehan (2012), supra n. 172, p. 438.

<sup>241</sup> *Hadijatou Mani* [2008] supra n.67, para 80; ILO (2009), supra n.67, p.37.



meaning. Whilst the Australian High Court confirmed that the ‘harsh and exploitative conditions do not themselves amount to slavery,’ the offence is distinguishable in law on the basis of whether a right of ownership is being exercised. Thus reinforcing the hierarchical assertion of the European Court. However, as Allain suggests, the judgment does demonstrate that whilst chattel slavery ‘falls within the definition [...] it would be inconsistent to read the definition as limited to that form of slavery’.<sup>242</sup> Similarly, the first engagement with the notion of slavery by the Inter-American Court of Human Rights in *Hacienda Brasil Verde Workers v Brazil* [2016] saw recognition of the contemporary nature of slavery but also the need for the factual circumstances to amount to the “exercise of powers attached to the rights of ownership.” Taking into account the impossibility of legal ownership, we will now consider the extent to which the exercise of powers of ownership is a stumbling block in the next section.

### 3.2 Slavery’s stumbling block: the impossibility of a legal right of ownership

In *Siliadin*, the Court’s focus on legal ownership restricted the reading of Article 1 of the Slavery Convention to a narrow interpretation equating slavery to chattel slavery.<sup>243</sup> Furthermore, the *Siliadin* judgment’s adherence to the traditional definition of slavery suggests that ‘if it is not legally possible to keep a “slave”, because one cannot own another person, then no one can ever be enslaved.’<sup>244</sup> The Court’s restrictive interpretation is problematic for two reasons that are of particular relevance to the current thesis: first, as noted by Cullen, ‘such a strict definition of slavery may lead to difficulties where the facts are less clear and a dispute over the scope of slavery may arise’<sup>245</sup> and second, Nicholson argues that if the interpretation of slavery is premised solely on evidence of ‘legal’ ownership, genuine victims of slavery may well fall into the descriptors of forms of servitude, rather than within the meaning of slavery under the 1926 Convention.<sup>246</sup> As such, Piotrowicz concludes, the decision is disappointing for its reasoning on slavery.<sup>247</sup>

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<sup>242</sup> Allain (2009), supra n.138, p. 251.

<sup>243</sup> Nicholson (2010), supra n.124, p. 705.

<sup>244</sup> Piotrowicz (2012), supra n.58, p. 185.

<sup>245</sup> Cullen, H., ‘*Siliadin v France*: Positive obligations under Article 4 of the European Convention on Human Rights (2006) *Human Rights Law Review* 6(3), 585-592, p. 592.

<sup>246</sup> Nicholson (2010), supra n.124, p. 711.

<sup>247</sup> Piotrowicz (2012), supra n.58, p. 190.

The institution of marriage as the exercise of rights of ownership has received different judicial interpretations. In *Hadijatou Mani v. Republic of Niger* [2008] the *continuation* of the condition of enslavement (ergo the exercise of the rights of ownership) was linked to the institution of marriage despite the applicant being issued with a ‘certificat d’affranchissement (d’esclave)’.<sup>248</sup> However, in *M and Others v Italy and Bulgaria* [2012], the European Court dismissed the case on the basis of insufficient evidence of slavery.<sup>249</sup> The Court held that the exchange of money as a dowry for marriage did not represent the monetary price of a transfer of ownership. Instead, the Court drew upon the cultural tradition of the bride’s family receiving monetary contributions, and stressed the prevalence of such a tradition, to the extent that it was deemed as an acceptable social practice rather than constituting an indicator of exploitation. Similarly, the role of the applicant in the household also fell within the expectations of a member of a household and did not amount to servitude or forced or compulsory labour.<sup>250</sup>

The prevailing judicial understanding and interpretation of Article 1 of the 1926 Convention, as demonstrated by the courts in *Kunarac* and *Tang*, is the impossibility to exercise a genuine legal right of ownership:

*The Appeals Chamber will however observe that the law does not know of a “right of ownership over a person”. Article 1(1) of the 1926 Slavery Convention speaks more guardedly “of a person over whom any or all of the powers attaching to the right of ownership are exercised.” That language is to be preferred.*<sup>251</sup>

*Tang* made a distinction between “status” or “condition” which, as Tully reiterates, amounts to either *de jure* slavery, where the status of a person as a slave is created by or recognised in law, or *de facto* slavery, where the factual condition of slavery does not have any legal recognition.<sup>252</sup> As the 1926 convention sought to operationalise a definition of slavery where the status of slavery in law was

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<sup>248</sup> *Hadijatou Mani* [2008] supra n.67, para 80.

<sup>249</sup> The ILO casebook of court decisions emphasised the need to pay ‘close attention to the negative cases [...] These negative cases, often involving difficult fact patterns, can provide a telling view of what forced labour is by examining what it is not’ in ; ILO (2009), supra n.67, p. 6.

<sup>250</sup> *M & Others* [2012], supra n. 170, para 161.

<sup>251</sup> *Kunarac* [2002], supra n.238, paras 117-118.

<sup>252</sup> Tully (2010), supra n.138, p. 408.

impossible,<sup>253</sup> scholars including Allain and Keane claim that these judgments have affirmed that *de facto* slavery is included in the definition,<sup>254</sup> providing legal clarity by acknowledging that despite the impossibility of *de jure* slavery, *de facto* slavery can be dealt with under the prohibition of slavery. Similarly, the Inter-American Court in *Brasil Verde*, recognised the need to ensure that the prohibition of slavery is applicable in a contemporary setting by acknowledging that a contemporary definition of slavery includes both the *de jure* or *de facto* situation or condition of the victim.<sup>255</sup>

In short, the judicial analysis has confirmed that whilst a situation of slavery must present with the exercise of powers attached to the rights of ownership.<sup>256</sup> Similarly, the shift away from *de jure* slavery to an understanding premised upon *de facto* slavery not only emphasises the impossibility of legal right of ownership (*de jure*) but also means that any contemporary understanding of slavery hinges upon the clarification of the material scope of “*any or all of the powers*” of ownership (*de facto*).

### **3.3 A contemporary interpretation: any or all of the powers of ownership as control**

As demonstrated in the previous sections, all cases explicitly state that the key distinction between slavery and other forms of servitude is that a situation of slavery must present with the exercise of *powers attaching to the right of ownership*.<sup>257</sup> However, in *Kunarac*, the ICTY held that the destruction of juridical personality alone does not amount to slavery, but instead any destruction of the victim’s juridical personality must be ‘the *result of the exercise of any or all of the powers* attaching to the right of ownership’ [emphasis added].<sup>258</sup> Such a position leads to a disjuncture as to how the Courts clarify their position in terms of the contemporary operationalisation of this element.

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<sup>253</sup> Tully (2010),supra n.138, p. 408.

<sup>254</sup> Allain (2009), supra n.138, p. 247; Keane (2013), supra n. 174, p. 186; Allain, J., & Bales, K., “*Slavery and its Definition*”, (2012) Queen's University Belfast Law Research Paper No. 12-06, p. 3.

<sup>255</sup> *Hacienda Brasil Verde* [2016], supra n. 158, para. 270

<sup>256</sup> Tully (2010),supra n.138, p. 416.

<sup>257</sup> Tully (2010),supra n.138,p. 416.

<sup>258</sup> *Kunarac* [2002], supra n.238, para 118.

The case law analysis has shown that it is not necessary for “all” of the powers attaching to the right of ownership to be exercised with a preference for “any” of them to be present.<sup>259</sup> In order to determine whether or not any of these powers had been exercised and/or are present amounted to a situation of enslavement, a number of indicators were outlined by the ICTY Trial Chamber and affirmed by the Appeals Chamber. These indicators were considered to facilitate the assessment of the factual circumstances to determine whether a person was being held in slavery due to ‘the control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, forced, threat or force of coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality, forced labour.’<sup>260</sup> The ECOWAS Community Court of Justice employed these factors to assess whether or not the factual circumstances amounted to enslavement.<sup>261</sup> The Appeal Chamber affirmed that these *indicia* are non-exhaustive and must be assessed on a case by case basis:

*[...] it is not possible exhaustively to enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea; this Judgement is limited to the case in hand.*<sup>262</sup>

The Australian High Court adopted a similar approach in *Tang*, affirming that each case will need to be determined on a case by case basis, taking into account the norms prevailing in the temporal and geographical context – suggesting space for an evolutionary and ambulatory approach that takes into account contemporary practices. To this end, the following powers of ownership were outlined:

*[...] the power to make the complainants an object of purchase, the capacity, for the duration of the contracts, to use the complainants and their labour in a substantially unrestricted manner, the power to control and restrict their movements, and the power to use their services without commensurate compensation.*<sup>263</sup>

Whilst both judgments provide an overview of the “powers attached to the right

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<sup>259</sup> Tully (2010), *supra* n.138, p. 418.

<sup>260</sup> *Kunarac* [2002], *supra* n.238, paras 117-119. Allain (2013), *supra* n.1, p.270.

<sup>261</sup> *Hadijatou Mani* [2008] *supra* n.67, para 77; ILO (2009), *supra* n.67, p.37

<sup>262</sup> *Kunarac* [2002], *supra* n.238, para. 119.

<sup>263</sup> *Tang* [2008], *supra* n. 236, para. 50.

of ownership” the Australian High Court did not go as far as the ICTY in *Kunarac*.<sup>264</sup> The ICTY’s introduction of concepts such as ‘oppression of the individual; deception and abuse of power creating a situation of vulnerability; and cruel treatment or abuse, is more expansive than the Australian High Court’s interpretation of powers reflecting ownership, with the exception of the power of control and restriction of movement.’<sup>265</sup>

In *Kunarac*, ‘the tribunal asserted that ownership was an essential element of slavery but found that slavery had been established in circumstances which could just as easily be described as control rather than ownership.’<sup>266</sup> The subsequent case of *Tang* sought to ensure that such an interpretation was restricted to ‘powers of the kind and degree that would attach to a right of ownership if such a right were legally possible, not powers of a kind that are no more than an incident of harsh employment, either generally or at a particular time or place.’<sup>267</sup> The notion of control has since been referenced by a third party intervention in the case of *CN & V v France* [2012], where it was considered to be ‘a crucial element common to all the forms of exploitation of human beings covered by Article 4 of the Convention.’<sup>268</sup>

The notion of control as possession was further galvanised by the judgment in the case of *Hacienda Brasil Verde Workers v Brazil* [2016] where the court held that ‘ownership’ ought to be understood as ‘possession’ in cases involving slavery which amounts to the exercise of control over another. However, the Court stipulated that the exercise of control must ‘significantly deprive that person of his or her individual liberty.’<sup>269</sup> The Inter-American Court also adopted the indicators used in *Kunarac* to further delineate the factual circumstances in the *Brasil Verde* case as those that amount to slavery.<sup>270</sup> Interestingly, the operationalisation of these indicators also led to the Court recognising the duality of circumstances, stipulating that whilst the factual circumstances of the case amounted to forced labour and servitude (debt bondage) they also reached the stricter elements of the above-mentioned definition of slavery.<sup>271</sup>

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<sup>264</sup> McGeehan (2012), supra n. 172, p. 440.

<sup>265</sup> Allain (2009), supra n.138, p. 251.

<sup>266</sup> Cullen (2006), supra n.245, p. 592.

<sup>267</sup> *Tang* [2008], supra n. 236, para. 44; Allain (2009), supra n.138, p. 256.

<sup>268</sup> See reference to Aire Centre Intervention in *C.N. & V. v France* [2012], para 67.

<sup>269</sup> *Hacienda Brasil Verde* [2016], supra n. 158, para 271.

<sup>270</sup> *Hacienda Brasil Verde* [2016], supra n. 158, para 304.

<sup>271</sup> *Hacienda Brasil Verde* [2016], supra n. 158, para 304.

Such indicators are of great assistance to the judiciary who are, for instance, required to tackle the distinction between exploitative practices, particularly in borderline cases. For instance, legal clarity is imperative when giving legal directions to juries who must decide whether the facts of the case amount to slavery or a lesser form of exploitation (as we will see in the file study analysis of England & Wales in Chapters 9 & 10).<sup>272</sup>

It is not only the judiciary who have employed the notion of control as the main focal point of the contemporary understanding of slavery.<sup>273</sup> Indeed, scholars, with a view to combatting *de facto* slavery, rather than *de jure* slavery, have also identified a key element, namely the exercise of powers of control which deprives a person, in a significant manner, of their individual liberty or autonomy and, ultimately; is meant to allow for exploitation, and is typically maintained through coercion or violence.<sup>274</sup> It is contended that the notion of control can be applied to other forms of labour exploitation, and not just slavery. Admittedly, the contemporary manifestation of “the exercise of the powers attaching to the right of ownership” can be determined by employing a property paradigm approach that considers ownership to be anchored in the control over a thing; ultimately, it refers to control (physical, psychological or otherwise) over a person in such a way as to significantly deprive that person of his or her individual liberty.<sup>275</sup> The legal understanding of control pivots on **possession as the *sina que non* of slavery** since you cannot sell a thing or profit from it to the exclusion of others unless you possess it. Such possession, in law, ultimately turns on demonstrating control.<sup>276</sup> This reasoning has been further refined in the Bellagio-Harvard Guidelines that provide a contemporary, non-legally binding explanation as to the meaning of “rights of ownership”. In essence, “ownership” is now tantamount to the degree of control exercised over an individual. The Guidelines state that ‘the exercise of “the powers attaching to the right of ownership” should be understood as constituting control over a person in such a way as to significantly deprive that person of his or her individual liberty, with the intent of exploitation through the use,

<sup>272</sup> Tang [2008], supra n. 236, para. 44; van der Wilt (2014), supra n.3, p. 313; Allain (2009), supra n.138, p. 253.

<sup>273</sup> Dottridge, M., ‘Trafficked and Exploited: The Urgent Need for Coherence in International Law’, in Kotiswaran, P., (ed.) *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, (Cambridge: Cambridge University Press, 2017), p. 62. Exercise of varying degrees of control exceeding normal employment relationship; Brennan (2017), supra n.96, p. 140.

<sup>274</sup> Allain (2013), supra n.1, p.120-121. See also third-party intervention from AIRE centre and PICUM that emphasised the notion of control in Chowdury [2017], supra n.100, para 67, see also Chapter 11.

<sup>275</sup> Allain (2013), supra n.1, p.127-128.

<sup>276</sup> Allain & Bales (2012) supra n.254, p. 6-7.

management, profit, transfer or disposal of that person. Usually this exercise will be supported by and obtained through means such as violent force, deception and/or coercion.<sup>277</sup> Another manifestation of control includes the conditions of dependency in the relationship between the perpetrators and the employees. For example, even though persons may not be physically confined to their workplace, their employers may still monitor them, retain their passports or identity documents or not provide a legal work permit.<sup>278</sup> Such discreet methods of control are difficult to detect and are exacerbated by an individual's isolation, ignorance and unfamiliarity with the country of destination's culture and other obstacles such as language barriers and a lack of awareness of employment rights.

#### **4. Judicial interpretation of the legal parameters of practices similar to slavery**

When it comes to the practices similar to slavery the judicial analysis reveals an engagement with the concept of servitude in place of 'practices similar to slavery'. The European Commission on Human Rights in *Van Droogenbroeck v Belgium* [1980] considered the concept of servitude to amount to a 'particularly serious form of denial of freedom.'<sup>279</sup> The Commission outlined three objective criteria, that requires i) the obligation to perform certain services for others; ii) the obligation for the 'serf' to live on another person's property and iii) the impossibility of altering his condition.<sup>280</sup> For the purpose of this determination, the Commission was guided by Article 1 of the 1956 Supplementary Convention.<sup>281</sup>

From the perspective of the international prohibition of 'practices similar to slavery', however, the judicial adjudication of servitude is problematic as it fails to refer to the four specific servitudes outlined in the 1956 Supplementary Convention, as a result, and as emphasised by Allain, fails to ascertain 'a manageable understanding of the term servitude.'<sup>282</sup> The Court, in *Siliadin v France* [2005], held that 'in the light of the case-law on this issue that for Convention purposes "servitude" means an obligation

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<sup>277</sup> Bellagio – Harvard Guidelines (2010) Guideline 2, – The Exercise of the Powers Attaching to the Right of Ownership.

<sup>278</sup> ILO (2008), supra n. 68, p. 25.

<sup>279</sup> *Van Droogenbroeck V, Belgium*, Report of the Commission 9 July 1980, Application N° 7906/77, para 80

<sup>280</sup> *Van Droogenbroeck V, Belgium*, Decision of 5 July 1979 on the admissibility of the application Application N° 7906/77, Para 3; Valéry *Van Droogenbroeck V, Belgium*, Report of the Commission 9 July 1980, Application N° 7906/77, para 79, *Siliadin* [2005], supra n.129, para 123; *C.N. and V.* [2012], supra n.208, para. 89.

<sup>281</sup> *Van Droogenbroeck* [1979], supra n.280, para 3; *Van Droogenbroeck* [1980], supra n.279, para 79; *C.N. and V.* [2012], supra n.208, para. 90.

<sup>282</sup> Allain (2013), supra n.1, p.160.

to provide one's services that is imposed by the use of coercion, and is to be linked with the concept of “slavery”.<sup>283</sup> Indeed, whilst the Court appears to have reiterated the parallels between slavery and servitude, it appears to have failed to distinguish between servitude and forced or compulsory labour (that also requires coercion and a menace of penalty).<sup>284</sup> With regards to coercion, the Court, in a later case of *CN v United Kingdom* [2012] clarified that forms of coercion, in the context of servitude, can be both direct and indirect.<sup>285</sup>

Whilst reinforcing the objective criteria established in *Van Droogenbroeck*, the Court in *CN & V v France* [2012] stated that servitude corresponds to a special type of forced or compulsory labour or, in other words, an “aggravated” forced or compulsory labour. On the one hand, this could be seen to further blur the distinction between the concepts prohibited under Article 4. However, the Court did in fact confirm that the fundamental distinguishing feature between servitude and forced or compulsory labour within the meaning of Article 4 of the Convention lies in the victims’ feeling that their condition is permanent and that the situation is unlikely to change.<sup>286</sup> Furthermore, the Court stated that in order to assess the situation, ‘it is sufficient that this feeling be based on the above-mentioned objective criteria [condition is permanent and that the situation is unlikely to change] or brought about or kept alive by those responsible for the situation.’<sup>287</sup> This assessment of the role of the exploiter is also a significant factor in the judicial interpretation of the material scope of exploitation that will be seen in subsequent chapters (see Chapter 9).

The Court in *CN & V v France* [2012] then went onto apply such an assessment to the two applicants:

- For one applicant, over a four-year period, the defendants had used her illegal administrative situation as one of the reasons to keep her living with them which was strengthened by incidents such as fraudulent hospitalisation and lack of access to education or training for future work. In addition, she had no days off

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<sup>283</sup> *Siliadin* [2005], supra n.129, para 124.

<sup>284</sup> Nicholson (2010), supra n.124, p. 712. Allain (2013), supra n.1, p.160.

<sup>285</sup> *C.N. v. United Kingdom*, 13 November 2012, Application No. 4239/08, para 80.

<sup>286</sup> *C.N. and V.* [2012], supra n.208, para. 91; European Court of Human Rights, Guide on Article 4 of the Convention - Prohibition of slavery and forced labour, (2nd Edition, 2014) para. 17.

<sup>287</sup> *C.N. and V.* [2012], supra n.208, para. 91.



and possibility for free time which would have enabled her to reach out to those who might assist. As a result, in addition to her situation amounting to forced or compulsory labour, the Court held that the applicant had been held in servitude.<sup>288</sup>

- In contrast, the Court assessed the situation of the second applicant not to amount to servitude because she was given access to education, including given time to do her homework, and was not confined to the house. This resulted in her being able to reach out to a school nurse, whom she informed of the situation.<sup>289</sup> As with the slavery case law presented in this chapter, the assessment is based on factors such as control and restriction of movement.

More recently, the judgment in *Hacienda Brasil Verde Workers v Brazil* [2016] saw the Inter-American Court adopt an alternative position to that of other supranational jurisprudence, with an assimilation of the prohibition of slavery to practices similar to slavery.<sup>290</sup> This is the first time that jurisprudence has sought to further clarify, aside from the categorical list in the 1956 Convention, the material scope of practices similar to slavery. In *Brasil Verde*, the Inter-American Court stated that practices similar to slavery constitute ‘the exercise of control over a person, through physical and psychological coercion, in such a way as to significantly deprive that person’s autonomy, with the intent of exploitation against the person’s will.’<sup>291</sup> The Inter-American Court then went on to state that servitude is a practice similar to slavery, which suggests that the two concepts are considered to be the same. However, the definitive position of the Court is ultimately not clear, as the Court then went on to accept the definition of servitude according to the objective criteria laid out in *Van Droogenbroeck*.<sup>292</sup>

Therefore, whilst the case law analysis appears to hint at the legal application of servitude rather than practices similar to slavery, there is still a need for clarification as to the preference between an exhaustive categorical approach or a broader objective assessment of the factual circumstances based on the three criteria.

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<sup>288</sup> *C.N. and V.* [2012], supra n.208, para. 92.

<sup>289</sup> *C.N. and V.* [2012], supra n.208, para. 93.

<sup>290</sup> *Hacienda Brasil Verde* [2016], supra n. 158, para 276.

<sup>291</sup> *Hacienda Brasil Verde* [2016], supra n. 158, para 276.

<sup>292</sup> *Hacienda Brasil Verde* [2016], supra n. 158, para 280.

## 5. Concluding remarks

The global abolition of slavery was initially hailed a success as it had led to a stimulation of shared values, a voluntary prohibition of slavery by State parties and the gradual elimination of the origins and causes of this conduct.<sup>293</sup> However, the success of the global slavery prohibition was arguably short-lived, in part due to the lack of adequate international implementation and enforcement of the existing international legislation and the hibernation of the prohibition of slavery as a tool for repression or advocacy against human exploitation.<sup>294</sup> The recent re-engagement with the prohibition of slavery, as we have seen in this chapter, further suggests that the slavery has ‘survived its abolition and has arguably thrived, despite the gradual recognition of its moral unacceptability and its global prohibition.’<sup>295</sup>

Nevertheless, the recent but limited judicial engagement with slavery, servitude and practices similar to slavery provide impetus for a better handling and demonstration of intolerance of such conduct. The maintenance of a high standard, given the gravity of such exploitative conduct (e.g. the *jus cogens* status of slavery), must also be accompanied by conceptual clarity and certainty in law. Such an advancement will be fundamental to the application of the protection measures in States and to the ability of the law to address the various practices it seeks to prohibit, especially taking into account the contemporary context of labour exploitation.<sup>296</sup>

For now, the state-of-the-art legal understanding of slavery, servitude and practices similar to slavery have given significant insight into the clarification of exploitation. For instance, the contemporary understanding of slavery recognises that the black letter law of the 1926 convention must be interpreted in accordance with the contemporary setting, as demonstrated by the shift away from ownership to an understanding premised upon the exercise of control.

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<sup>293</sup> Nanda, V., & Bassouini, M., ‘Slavery and the slave trade: steps towards eradication’, (1972) *Santa Clara Lawyer* 12, 424, p. 426.

<sup>294</sup> Nanda & Bassouini (1972), *supra* n.293, p. 442; Allain (2013), *supra* n.1, p.111; Allain (2008), *supra* n.209, xvii.

<sup>295</sup> McGeehan (2012), *supra* n. 172, p. 436.

<sup>296</sup> Nicholson (2010), *supra* n.124, p. 715.



## **CHAPTER 3 – State-of-the-art legal understanding of forced or compulsory labour**

### **0. Introduction and structure of the chapter**

One cross-cutting theme that has been identified in previous chapters and continues in the present chapter, follows Gallagher's assertion that there is a strong political and legal importance of upholding a clear distinction between the different concepts of exploitation.<sup>297</sup> For instance, the legal framework emphasises the need for a conceptual distinction between slavery and forced or compulsory labour, as demonstrated by Article 5 of the 1926 Slavery Convention wherein 'the implication is that forced labour is not identical in its invidiousness to slavery; the latter is completely unacceptable, while the former is merely undesirable.'<sup>298</sup> Further reinforcement of the differences between these forms of exploitation is evident from the instrumental and institutional division between forced labour and other forms of exploitation. Namely, the ILO holds the mandate to eliminate forced or compulsory labour, and the League of Nations, and subsequently the United Nations, have dealt with slavery, practices similar to slavery and servitude. Notwithstanding, as emphasised in Chapter 1, and despite a clear legal framework to the contrary, forced or compulsory labour is very often confused or conflated with human trafficking, therefore, it is important to reiterate, as have Lewis

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<sup>297</sup> Gallagher (2008), *supra* n. 55.

<sup>298</sup> Bassouini, M.C., 'Enslavement as an international crime' (1991) *International Journal of Law and Politics* 23, 445-517, p. 468.

et al, that ‘not all forced labour results from trafficking, and those responsible for deceptive border crossings may or may not be directly linked to subsequent exploitation.’<sup>299</sup>

As with slavery, servitude and practices similar to slavery, the legal understanding of forced or compulsory labour in a contemporary context has required adaptation in order to take account of societal and political shifts such as decolonialisation, globalisation, neoliberalism and the deregulation of the labour market.<sup>300</sup> Consequently, the shift from forced or compulsory labour as a State practice to a form of labour exploitation whereby an estimated 90% of forced labour occurs in the “private economy,”<sup>301</sup> is particularly unique to the trajectory of the abolition of forced or compulsory labour in law. As a result, the approach taken to recognise such political and societal changes, in the context of forced or compulsory labour can be contrasted to the forms discussed in previous chapters. In particular, such changes have been reflected by amendments to the law on the books, rather than reiterating the original text of the law and relying upon subsequent judicial interpretation to consider its application in a contemporary setting as is the case with slavery and servitude. Such an approach to forced or compulsory labour emphasises that any attempt to delineate what is meant by exploitation must be mindful of what Anderson & Rogaly refer to as the “multidimensional elements,” that are also of relevance to its understanding, such as the political economy and the structural issues that facilitate exploitation as we discussed when outlining the problem definition in the Introduction to the thesis.<sup>302</sup>

In this chapter we focus upon the development of the meaning of the prohibition of forced or compulsory labour in international and regional law (Section 1). The legal handling of forced or compulsory labour must be distinguished from the other standalone forms of exploitation discussed in Chapter 2. Taking into account historical change, the prohibition and definition of forced or compulsory labour in international law has been secured under a different institutional regime, namely international labour law. The remainder of this chapter will assess the international community’s

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<sup>299</sup> Lewis, H., Dwyer, P., Hodkinson, S., & Waite, L., (eds) *Precarious lives: forced labour, exploitation and asylum*, (Bristol: Policy Press, 2015), p. 1.

<sup>300</sup> IOM (2003) *supra* n.103, p. 46.

<sup>301</sup> ILO, *Global Estimate of Forced Labour 2012: Results and Methodology*, Geneva, 2012; ILO, *Profits and Poverty: The Economics of Forced Labour*, Geneva, 20 May 2014, p. 7; Allain (2013), *supra* n.1, p. 204.

<sup>302</sup> Anderson & Rogaly (2005), *supra* n.46, p. 10.

engagement with the concept in black-letter law which has not translated into practice due to limited powers of enforcement (Section 2), requiring further reinforcement of the law on the books (Section 3), and a significant contribution from the international and regional human rights legal regime to strengthen the prohibition of forced or compulsory labour (Section 4), as well as the further delineation of the concept in jurisprudence (Section 5).

## **1. Forced or compulsory labour in international and regional law**

Forced or compulsory labour was first mentioned, but not defined, in Article 5 of the Slavery Convention (1926), that outline the circumstances in which States may employ such a practice, whilst acknowledging the potential grave consequences of its use.

*The High Contracting Parties recognise that recourse to compulsory or forced labour may have grave consequences and undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.*

*It is agreed that:*

*(1) Subject to the transitional provisions laid down in paragraph (2) below, compulsory or forced labour may only be exacted for public purposes.*

*(2) In territories in which compulsory or forced labour for other than public purposes still survives, the High Contracting Parties shall endeavour progressively and as soon as possible to put an end to the practice. So long as such forced or compulsory labour exists, this labour shall invariably be of an exceptional character, shall always receive adequate remuneration, and shall not involve the removal of the labourers from their usual place of residence.*

*(3) In all cases, the responsibility for any recourse to compulsory or forced labour shall rest with the competent central authorities of the territory concerned.*

The inclusion of the term in Article 5 of the 1926 Convention demonstrated ‘a definite attempt to deal with forced or compulsory labour in a general international agreement.’<sup>303</sup> Allain, however, draws attention to the lack of a definition of the concept

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<sup>303</sup> Allain (2013), *supra* n.1, p. 214.

and the lack of limitations placed on forced or compulsory labour for public purposes as being indicative of the attitudes at the time of the Colonial powers wherein the need to use forced or compulsory labour was justified for the purpose of public works and development.<sup>304</sup> As we will demonstrate below, this historical State perspective is of relevance to the current thesis as it reinforces the role of the State (historically and currently) in creating exploitation and the impact that this has on determining a contemporary understanding of the legal scope of labour exploitation. It will be shown that shifts in societal attitudes impact upon the legal and political understanding of a particular phenomenon. For instance, the historical evolution of free labour must be understood from the perspective of a continuum wherein there is a shift in what is understood as practices amounting to exploitation.

The ILO Convention No.29 (Forced Labour, 1930) criminalises the illegal exaction of forced or compulsory labour and is the key international instrument concerning forced labour.<sup>305</sup> Article 2(1) of the Convention defines forced or compulsory labour as:

*For the purposes of this Convention the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.*

The forced or compulsory labour definition is purposely broad with explicit reference to both work or services and does not enumerate a list of prohibited practices. The ILO report that the wide definition of the Convention is applicable to all possible forms of forced labour, including slavery and slavery-like practices, debt bondage and trafficking in persons, and to all workers in both the public and private sectors.<sup>306</sup> In contrast to the approaches adopted for slavery, servitude and practices similar to slavery, the broad definitional approach towards forced or compulsory labour further reinforces its expansive understanding of this form of exploitation and, as a result, can lead to the duality of characterisation of a situation of labour exploitation. As such, we also follow Allain's articulation of forced or compulsory labour as 'a long arc of

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<sup>304</sup> Allain (2013), *supra* n.1, p. 215.

<sup>305</sup> Ollus & Jokinen (2011), *supra* n.66, p.18.

<sup>306</sup> ILO, *Report IV (1) Strengthening action to end forced labour*, International Labour Conference, 103rd Session, Geneva, 2014, para. 22, p. 8.

activities' wherein a particular situation may amount in law to multiple forms of exploitation, as long as the exploitation reaches the legal definition of both forced labour and that of the additional form of exploitation e.g. in the case of slavery, the exercise of powers attaching to the right of ownership.<sup>307</sup>

The ILO Convention definition outlines three key elements of the material scope of forced or compulsory labour: i) work or service; ii) menace of any penalty; and, iii) involuntary offer. First, the definition covers all **work or services**, with the exception of the work and services listed in Article 2(2):

*Nevertheless, for the purposes of this Convention, the term forced or compulsory labour shall not include--*

*(a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character;*

*(b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;*

*(c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;*

*(d) any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;*

*(e) minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.*<sup>308</sup>

Whilst the exceptions were refined in the ILO Convention No. 105 (Abolition of Forced Labour, 1957) under Article 1, the prohibition of forced or compulsory labour

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<sup>307</sup> Allain (2013), *supra* n.1, p. 203.

<sup>308</sup> Article 2(2), ILO, C029 - Forced Labour Convention, 1930 (No. 29), Convention concerning Forced or Compulsory Labour, 28 June 1930.



in the 1957 Convention is designed to complement and supplement the 1930 Convention:<sup>309</sup>

*Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour--*

- (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;*
- (b) as a method of mobilising and using labour for purposes of economic development;*
- (c) as a means of labour discipline;*
- (d) as a punishment for having participated in strikes;*
- (e) as a means of racial, social, national or religious discrimination.<sup>310</sup>*

As previously mentioned, the substantive differences of the understanding of the legitimate imposition of work or services between the 1930 ILO Forced Labour Convention and the 1957 ILO Abolition of Forced Labour Convention can be attributed to the shift in the political and economic climate at the time of drafting of these instruments. Whereas colonialist interests were still in play at the time of drafting the first instrument,<sup>311</sup> the subsequent 1957 instrument sought to address gaps by explicitly prohibiting the use of any form of forced or compulsory labour ‘as a method of mobilising and using labour for purposes of economic development.’<sup>312</sup> However, as Baccini & Koenig-Archibugi remind us, this purpose was not wholly accepted by States who wished to prioritise economic development over efforts to abolish forced labour.<sup>313</sup> As such, it is important to take heed of Maul’s assertion that any historical analysis of the instruments adopted by the ILO represents ‘a snap shot of a particular moment,

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<sup>309</sup> ILO, *Forced labour, General Survey by the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Conference, 52nd Session, Geneva, 1968, para. 4; ILO, *Committee of Experts, General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105), Report III (IB)*, Geneva, 15 February 2007, para. 11; ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1A)* International Labour Conference, 85th Session, Geneva, 1998, para. 105.

<sup>310</sup> Article 1, ILO, *C105 - Abolition of Forced Labour Convention, 1957 (No. 105), Convention concerning the Abolition of Forced Labour*, 25 June 1957.

<sup>311</sup> *Van Der Musselle v. Belgium*, 23 November 1983, Application no. 8919/80, para 32.

<sup>312</sup> Article 1(b), ILO Convention No. 105 (Abolition of Forced Labour, 1957).

<sup>313</sup> Baccini, L., & Koenig- Archibugi, M., ‘Why do states commit to international labour standards?: Interdependent ratification of core ILO Conventions, 1948-2009,’ (2014) *World politics* 66(3), 446-490, p. 481.

reflecting the majorities and the balances of power at the time of the debate.’<sup>314</sup> Again, and learning from historical accounts, it is reiterated that any discussion of the contemporary context must take into account the political and economic priorities of States before determining their engagement with efforts to eradicate labour exploitation.<sup>315</sup>

Second, the exaction of work or services under *the menace of any penalty* does not only refer to legal penalties, but also to the loss of rights or privileges.<sup>316</sup> As affirmed by the ILO Supervisory bodies, the penalty does not have to take on the form of a penal sanction.<sup>317</sup> Therefore, the interpretation of penalty need not be in the strict sense to mean punishment attributed by a court of law, but rather as a penalty or punishment inflicted by any persons or body.<sup>318</sup> The ILO has identified the following forms of menace of penalty:

- physical violence or restraint, or even death threats addressed to the victim or relatives;
- threats to denounce victims to the police or immigration authorities when their employment status is illegal;
- threats to denounce victims to village elders in the case of girls forced to prostitute themselves in distant cities;
- economic penalties linked to debts;
- the non-payment of wages;
- the loss of wages accompanied by threats of dismissal if workers refuse to do overtime beyond the scope of their contract or of national law;
- the retention of identity papers by employers and may use the threat of

<sup>314</sup> Maul, D., ‘ILO and Globalisation of Human Rights’ in Hoffmann, S. L., *Human rights in the 20th Century*, (Cambridge: Cambridge University Press, 2011), p. 310.

<sup>315</sup> See discussion on emergence of exploitation within set of multidimensional processes embedded in operation of labour markets and economies in academic discourse, including *inter alia* Lewis, H., & Waite, L., ‘Migrant illegality, slavery and exploitative work,’ in Craig, G., Balch, A., Lewis, H., & Waite, L., (eds) *Modern slavery agenda: policy, politics and practice in the UK* (Policy press, 2019), p. 219; Nelson, R., & Kidd, A., ‘Approaching Contemporary Slavery Through an Historic Lens: an Interdisciplinary Perspective’, (2018) *Journal of Modern Slavery* 4(2), 1-19.

On political economy and the establishment of positive obligations in Stoyanova (2014) *supra* n. 108, p. 412-414.

On role of state in regulating recruitment and employment in the private economy facilitating exploitative practices in Anderson & Rogaly (2005), *supra* n.46, p. 10; Amnesty International (2014), *supra* n.100, p. 3-4.

On the structural conditions that produce the asymmetry of power between individual ‘modern slaveholders’ over individual ‘modern slaves’ in O’Connell Davidson, J., ‘Editorial: The Presence of the Past: Lessons of history for anti-trafficking work’, (2017) *Anti-Trafficking Review*, issue 9, 1—12, p.3.

On different forms of systemic interdependence contributing to human trafficking related structural violence see Gebrewold, B., ‘Human Trafficking and Structural Violence’ in Gebrewold, B., Kostenzer, J., & Müller, A. T., *Human trafficking and exploitation: Lessons from Europe*, (Routledge, 2017), pp15-29.

<sup>316</sup> ILO (2007), *supra* n. 309, p. 20.

<sup>317</sup> ILO, *Fundamental Rights and Work and International Labour Standards*, Geneva, 2003, p. 36.

<sup>318</sup> Allain (2013), *supra* n.1, p. 219.

confiscation of these documents in order to exact forced labour.<sup>319</sup>

The loss of rights or privileges was further enumerated by the ILO Supervisory Committee to include the loss of certain rights, advantages or privileges such as promotion, transfer, access to new employment, the acquisition of certain consumer goods, housing or participation in university programmes.<sup>320</sup> Such factors are perceived as contributing to the individual vulnerability that is conducive to the emergence of forced labour situations.<sup>321</sup>

The third element of the definition of forced labour states that ***the worker must not have offered him/herself to the work voluntarily***. To this end the consent of the individual is irrelevant where it has been given under menace of penalty, as it results from the use of indirect coercion.<sup>322</sup> Similarly, despite the inalienable right of the worker to free choice of employment, this must be accompanied by the right to freely terminate the employment, where the latter is restricted then this constitutes a menace of penalty, and thus the work is deemed involuntary.<sup>323</sup> Another example, refers to the impossibility to consent to employment where there is a lack of knowledge of the working conditions (including place, time, duration, regime and remuneration). Thus, when incorrect information as to the working conditions is provided, one cannot infer consent.<sup>324</sup> A definitional quagmire emerges, however, where as a result of a lack of socially and economically attractive options in situations of migration, an individual consents to or voluntarily enters into an exploitative labour situation, knowing that the conditions are not appropriate but that they are nevertheless going to be better than the labour and living standards in their country of origin.<sup>325</sup> Where the individual has been accurately informed of the conditions, then it does not amount to a coercive or forced situation.

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<sup>319</sup> ILO (2005), supra n.9, p. 5; ILO, *Report I(B), Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Conference, 98th Session, Geneva, 2009; ILO, *Operational indicators of trafficking in human beings Results from a Delphi survey implemented by the ILO and the European Commission*, Geneva, 2009 p. -5-6 ILO, *Human trafficking and forced labour exploitation. Guidance for legislation and law enforcement*, Geneva, 2005, p. 20-21.

<sup>320</sup> ILO (2007), supra n. 309, p. 20.

<sup>321</sup> Anderson & Rogaly (2005), supra n.46, p. 16.

<sup>322</sup> ILO (2007), supra n. 309, p. 20-21.

<sup>323</sup> ILO Guidance (2005), supra n.319, p. 23.

<sup>324</sup> Pushkarova, I., 'The Bulgarian Legislation on the Crime of Human Trafficking in Due Process for Victims of Human Trafficking', (2010) *Bulgarian Judges Association Publication*, 99-100, pp. 99-100 and p. 106.

<sup>325</sup> Clesse, Ch.-E., et al, *La traite des êtres humains et le travail forcé*, (Bruxelles: Larcier, 2014), p. 5.

The involuntary nature of forced or compulsory labour is however put into question by the following conundrum, also put forward by Gallagher:<sup>326</sup> is it possible to consent to exploitation? Ultimately, it is very unlikely for such situations to not have elements that have exacerbated the background circumstances of an individual leaving them with no other alternative but to accept such conditions (even if willingly). For instance, scholars have attested to the fact that debt bondage and bonded labour are increasingly a feature of forced labour, that is ultimately the outcome of debt-financed migration.<sup>327</sup> Further to this, literature also recognises that the tied nature of the employment, leaves workers vulnerable to exploitative living and working conditions and increases the dependency on employers.<sup>328</sup> For this reason, as emphasised by Clesse et al, the issue of consent is an overarching and organic element of the situation, that must be considered at all stages of the factual circumstances.<sup>329</sup>

To assist with the grappling of such complex factual situations, the ILO has subsequently determined a number of indicators<sup>330</sup> whereby the presence of a single indicator in a given situation may, in some cases, imply the existence of forced or compulsory labour and, by consequence, the irrelevance of consent: abuse of vulnerability, deception, restriction of movement, isolation, physical and sexual violence, intimidation and threats, retention of identity documents, withholding of wages, debt bondage, abusive working and living conditions, excessive overtime.<sup>331</sup> These indicators are also illustrative of the forms of coercion that are used to maintain control over a worker and can foster dependence on the worker.<sup>332</sup>

Taking these indicators into account and referring back to the above discussion on the need for freedom of choice free from menace of penalty, we can consider the work of Andrees & van der Linden who investigated the labour perspective of human trafficking. As a result, they adopted a narrower line of questioning when determining whether or not one of the indicators had rendered the original consent irrelevant. The question posed was: have you been free to change or leave your employment at any

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<sup>326</sup> Gallagher (2008), supra n. 55.

<sup>327</sup> Bales & Robbins (2001), supra n. 226, p. 36.

<sup>328</sup> Gallagher, A., 'Exploitation in migration: unacceptable but inevitable', (2015) *Journal of International Affairs* 68(2), 55-74, p. 57. Weitzer (2015) supra n.48, p. 227.

<sup>329</sup> Clesse, et al (2014), supra n.325, p. 7..

<sup>330</sup> First presented as 6 indicators in 2005 and then extended in 2012 to 11 indicators.

<sup>331</sup> ILO, Operational indicators of trafficking in human beings Results from a Delphi survey implemented by the ILO and the European Commission, March 2009.

<sup>332</sup> Anderson & Rogaly (2005), supra n.46, p. 36.

given time?<sup>333</sup> This thesis considers this line of questioning to be of significance as it relates to the discussion of notion of “control” and individuals’ perception of their ability to change their circumstances that has emerged from the analysis of the parameters of contemporary forms of slavery and servitude in Chapter 2 as key features of exploitation and will be discussed in greater detail in subsequent chapters.

## **2. Implementing the prohibition of forced or compulsory labour**

The prohibition of forced labour contained in the ILO’s Forced Labour Convention is widely ratified, and the elimination of forced labour is one of the 19 strategic outcomes set out in the ILO Strategic Policy Framework.<sup>334</sup> Nevertheless, despite its widely accepted legal recognition, forced or compulsory labour is considered by some to be a flawed legal concept, as it is regarded as a political tool to serve the State’s interests. For instance, McGeehan suggested that ‘the purpose of its introduction was the facilitation of a form of State-sanctioned slavery in colonial Africa.’<sup>335</sup> Furthermore, in the contemporary context, Skrivankova has clearly demonstrated that the prohibition of forced labour through international or general legal norms is very difficult to enforce and prosecute unless there is a corresponding criminal offence created in the national law.<sup>336</sup> This is further reinforced by Stoyanova who reflects upon the low level of engagement by ILO Member States to incorporate the criminal offence of forced or compulsory labour in their domestic criminal legal framework.<sup>337</sup> In addition, where the concept of forced or compulsory labour has been applied in domestic law, Muskat-Gorska demonstrates that there have been diverse understanding of its meaning and its indicators, leading to a lack of harmonised approach in national legislation or case law.<sup>338</sup>

Despite these concerns, the ILO has taken further action to abolish forced labour by targeting practices that may lead to situations of labour exploitation<sup>339</sup> and to

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<sup>333</sup> Andrees & van der Linden (2005), *supra* n.51, p. 58. See the description of the employee-employer relationship in the ‘PESHGI’ System in Report Submitted by the Advocate-General, Punjab to the Supreme Court in *Darshan Masih v. State*, P.L.D. 1990 S.C. 513, cited in ILO (2009), *supra* n.67, p.53.

<sup>334</sup> ILO Tripartite Meeting of Experts (2013), *supra* n. 126, p. 1.

<sup>335</sup> McGeehan (2012), *supra* n. 172, p. 347.

<sup>336</sup> Skrivankova (2010), *supra* n.50, p. 8.

<sup>337</sup> Stoyanova (2014) *supra* n. 108, p. 429.

<sup>338</sup> Muskat-Gorska, Z., Can labour make an effective contribution to legal strategies against human trafficking?, in Piotrowicz, R., Rijken, C., and Uhl, B. H., eds, *Routledge Handbook of Human Trafficking*, 2017, p.464.

<sup>339</sup> ILO Convention No. 105 (Abolition of Forced Labour, 1957).

regulate working conditions such as working time<sup>340</sup> and payment of wages.<sup>341</sup> However, ILO Conventions will only become legally binding once they are ratified by State parties and enforcement powers are limited. There are three forms of enforcement action:

i) **Member States**, upon ratification of a Convention, **must report** to the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts) who will provide an independent appraisal on the technically measures adopted to apply international labour standards.

ii) Certain **Observations of the Committee of Experts** are then examined by the Conference Committee on the Application of Standards, a tripartite committee of the International Labour Conference, with discussions and recommendations published in its General Report. The Comments and observations of the Committees constitute the ILO jurisprudence, and unless contradicted by the International Court of Justice are to be considered as valid and generally recognised.

iii) Finally, a **complaints procedure** is foreseen by Article 24 ILO Constitution, wherein an employers' or workers' organisation can submit a representation against any government that, in its view, has not properly applied a Convention it has ratified. If deemed admissible, the complaint will then be examined by a tripartite committee established by the ILO Governing Body, where the complaint is upheld, the Governing Body may establish a Commission of Enquiry. Such a mechanism is rarely used, and when enforcement action is taken, it can be seen to lack teeth, as can be evidenced by the enforcement action on forced labour against Burma in 2000, the first time any action was taken and it was served in the form of a proposal that States be invited to take 'appropriate measures', an approach that will be unlikely to have any real impact on changing practices in the non-compliant State.<sup>342</sup>

Admittedly, it is important to bear in mind Baccini & Koenig-Archibugi's claim that such a system of enforcement is implicitly open for critique since the ILO framework is based upon the notion of reciprocated cooperation amongst treaty

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<sup>340</sup> ILO Convention No. 1 (Hours of Work [Industry], 1919), restricts working hours in industry (broadly, manufacturing and construction) to eight per day, 48 per week, subject to various conditions, and ILO Convention No. 14 (Weekly Rest [Industry], 1921), which guarantees at least one period of 24 hours' rest per week.

<sup>341</sup> ILO Convention No. 95 (Protection of Wages) requires the regular payment of wages, restrictions on what and how deductions may be made, and mechanisms for making workers with outstanding wages preferential creditors in the event of insolvency of the employer.

<sup>342</sup> Balch, A., *Detecting and Tackling Forced Labour in Europe*, JRF Programme Paper (June 2013), p. 18.

signatories.<sup>343</sup> Nevertheless, the often-detailed content of ILO Conventions reduces ambiguity about what constitutes compliance and makes it easier to determine whether a State has complied or not. States are subject to demanding reporting obligations and the supervisory system of the ILO processes information on national labour laws and practices that originates not only from governments but also from private organisations, notably trade unions. States that are found to be in violation of their obligations are named and shamed and exposed to the possibility of sanctions by other States.<sup>344</sup> Furthermore, domestic actors, such as trade unions, civil society and national legislators may play a key role in uncovering practices that are not in conformity with the ratification process.<sup>345</sup>

### 3. Reinforcing the prohibition of forced or compulsory labour

These political factors and conceptual concerns were taken into account as part of the drafting process of the newly adopted ILO Protocol No. 14 (Forced Labour, 2014). In particular, and as already touched upon, Ollus notes the need to recognise that ‘the definition of forced labour must be reinterpreted in a contemporary social and historical context, where forced labour is no longer a state-sponsored (colonial) activity, but mainly a form of exploitation by private actors.’<sup>346</sup> In this regard, it is recognised that the occurrence of exploitation in the private sphere increases due to its *locus* being ‘a secretive place, [...] often outside of, or on the fringes of, legal and societal protections and recognition.’<sup>347</sup> The regulatory response to this shift has, to a certain extent, manifested in the recognition that States have a positive obligation to prevent forced or compulsory labour. In this regard, criminalisation of the practice is only a first step leading to an evolution towards much broader positive obligations on States (see below) that seek to adapt to the increased involvement of non-State actors as the principle perpetrators.<sup>348</sup>

#### Article 1(3) of the ILO Protocol of 2014 to the Forced Labour Convention, 1930

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<sup>343</sup> Baccini & Koenig- Archibugi (2014), *supra* n.343, p. 446.

<sup>344</sup> Baccini & Koenig- Archibugi (2014), *supra* n.343, p. 453.

<sup>345</sup> Baccini & Koenig- Archibugi (2014), *supra* n.343, p. 455.

<sup>346</sup> Ollus (2015), *supra* n.1, p. 229.

<sup>347</sup> Haynes (2009), *supra* n.97, p. 5.

<sup>348</sup> Turner, I., ‘Positive obligations and article 4 of the European convention on human rights: a defence of the UK’s Human Rights Act 1998’, (2014) *International Journal of human rights law* 18(1), 94-114, p. 100.

(P029, hereafter referred to as the Protocol) reaffirmed the ILO Convention definition of forced or compulsory labour, but both the promulgation of the Protocol and its accompanying Forced Labour (Supplementary Measures) Recommendation, 2014 (R203 – hereinafter referred to as the Recommendation) demonstrates, as Radeva Berket suggests, recognition from the international community that the nature and form of forced labour had changed since the 1930 Convention on Forced Labour, and that its transnational component requires cross-border collaboration and innovative approaches.<sup>349</sup> In particular, the Protocol and Recommendation seek to ensure the application of the measures therein to include ‘specific action against trafficking in persons for the purposes of forced or compulsory labour.’<sup>350</sup>

Andrees claims that the ILO instruments are merely complementary to the Palermo Protocol, as the latter is more specific on forms of coercion, exploitation and for instance goes beyond the provision of work or services to include forced prostitution.<sup>351</sup> However, we draw on the ILO instruments as reinforcement of the standalone nature of forced or compulsory labour and for those forms of exploitation that are not explicitly listed in the international definition of human trafficking. For example, the ILO Conventions recognise other forms of exploitation including, begging or other criminal activities, that are not enumerated in the Palermo Protocol but are considered as part of the ILO’s understanding of “labour” in the ILO Convention No. 182 and the ILO supervisory bodies and thus among forms of forced labour.<sup>352</sup> Furthermore, the final text ensures that the measures therein are applicable to ‘all instances of forced labour, whether or not they arose as a result of trafficking’ and that ‘many of the measures aimed at preventing and eliminating forced labour are applicable whatever the source or form of forced labour.’<sup>353</sup>

Muskat-Gorska praises the approach of the ILO Protocol and Recommendation for lifting ‘the labour approach to human trafficking to international level by adding labour considerations to the treatment of trafficking persons in so far as they become victims of forced or compulsory labour.’<sup>354</sup> However, this thesis wishes to exercise

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<sup>349</sup> Radeva Berket (2015) *supra* n. 44, p.362.

<sup>350</sup> Article 1(3), ILO Protocol of 2014 to the Forced Labour Convention, 1930 (P029).

<sup>351</sup> ILO (2008), *supra* n. 68, p. 2.

<sup>352</sup> Bakirci (2009), *supra* n. 64, p. 163.

<sup>353</sup> ILO (2014), *supra* n.304, p. 5.

<sup>354</sup> Muskat-Gorska (2017), *supra* n.338, p.460.



caution as it is contended that such an approach may still lack the ability to achieve policy coherence due to the lack of a robust monitoring mechanism as well as the non-binding nature of the recommendation where the bulk of the measures lie.

Notwithstanding, this thesis acknowledges the strength of the ILO forced or compulsory legal framework to protect against exploitation by ensuring, as described by Baccini & Koenig-Archibugi, ‘a level playing field in the global economy’ by limiting the temptation for governments and employers to facilitate a race to the bottom by lowering labour standards as part of the goal of creating a comparative advantage in international trade.<sup>355</sup> In addition, the same authors consider that the ILO Conventions serve as political and economic mechanisms whereby States may strive to improve domestic labour market standards without jeopardising their economic position amongst global competitors. Such a situation would result in States becoming more willing to commit to ILO standards once their economic competitors have adhered to the ILO framework.<sup>356</sup>

#### **4. Strengthening the prohibition of forced or compulsory labour**

The value of the ILO’s approach to the prohibition of forced or compulsory labour can be ascertained from the regional prohibition, wherein a number of key binding and non-binding human rights instruments are of pertinence; namely, Article 4 UDHR, Article 4 of the European Convention on Human Rights, Article 5 EU Charter on Fundamental Rights, and Article 6 of the American Convention on Human Rights. Of particular relevance, it must be noted that these human rights instruments do not define forced or compulsory labour, instead they refer to the 1926 Slavery Convention and 1930 ILO Convention definition of forced or compulsory labour respectively. Whilst this thesis recognises, as does McGeehan, that these instruments ‘predate the birth of the instruments and mechanisms of human rights law,’ this thesis asserts that it is nevertheless important to consider the extent to which the international human rights regime has bolstered the prohibition of forced or compulsory labour.<sup>357</sup>

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<sup>355</sup> Baccini & Koenig- Archibugi (2014), *supra* n.343, p. 446.

<sup>356</sup> Baccini & Koenig- Archibugi (2014), *supra* n.343, p. 448.

<sup>357</sup> McGeehan (2012), *supra* n. 172, p. 347.

The normative framework of international human rights law provides workers, and in particular migrant workers, with the ‘legal and political space’ to reinforce labour standards and to ‘bring the scope of state responsibility into sharper focus.’<sup>358</sup> In addition to the prohibition on forced or compulsory labour and associated rights such as freedom of association and freedom from inhuman and degrading treatment, the international human rights law framework, also enshrines core labour standards. For example, the UDHR guarantees the right to ‘just and favourable conditions of work’ and subsequent human rights treaties such as the ICCPR, ICESCR, and UN Convention on Rights of Migrant Workers enshrine general protection to workers, irrespective of immigration status, including in relation to remuneration and fair wages, safe and healthy working conditions, reasonable working hours and non-discrimination.<sup>359</sup> In their study of forced labour and migration in the UK, Anderson & Rogaly envisage the considerable overlap and convergence between international human rights law and the ILO standards as creating a means of enforcement in addition to that which is available within the ILO system.<sup>360</sup>

In particular, whilst the ILO had already achieved significant steps towards securing international agreements and standards on a number of labour related issues, including: minimum age regulation, wages, working hours, invalidity insurance, unemployment provision; the development of the universal human rights regime was an opportunity to further ensure the universal coverage of ILO labour standards as until then, they only covered a handful of economically advanced European countries. Thus by 1945, the ILO, with the establishment of the international human rights regime, was able, according to Maul, to ‘take a working mechanism and bring human rights principles into a form binding under international law.’<sup>361</sup> The binding nature of the international labour standards was further entrenched as a result of increased membership and an unprecedented acceptance of ILO human rights standards evidenced by a record number of ratification of norms.<sup>362</sup> However, in the 1960s, such political and moral commitment to human rights was side-lined in favour of economic development; for example, the 1962 ILO Supervisory Committee report listed countries

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<sup>358</sup> Chuang, J., ‘Beyond a snapshot: Preventing human trafficking in the global economy’, (2006) *Indiana Journal of Global Legal Studies* 13(1), 137-163, 157.

<sup>359</sup> Anderson & Rogaly (2005), *supra* n.46, p. 14-15.

<sup>360</sup> Anderson & Rogaly (2005), *supra* n.46, p. 14-15.

<sup>361</sup> Maul (2011), *supra* n.314, p. 303.

<sup>362</sup> Maul (2011), *supra* n.314, p. 315.

where compulsory labour service for young people was introduced. Despite condemnation for being in contravention with the ILO Forced Labour Conventions, the use of forced labour was defended by the new ILO Member States as a necessary means to mobilise all available forces to promote development.<sup>363</sup> By the 1990s, the promulgation of the Declaration on Fundamental Principles and Rights at Work was indicative of all Member States' commitment to the core inventory of human rights labour standards.<sup>364</sup>

Despite this, the international human rights framework has maintained the protection afforded to the individuals from the prohibited forms of labour exploitation. For instance, the prohibition of slavery, servitude and forced or compulsory labour in Article 8 of the ICCPR,<sup>365</sup> is perceived to be stronger than previous instruments as it can be enforced through its reporting mechanism and individual petition system.<sup>366</sup> However, the law in practice does not necessarily make full use of the enforcement provisions, for instance there have been very few individual communications under Article 8. This missed opportunity can be further emphasised by reference to the absence of a General Comment on Article 8 from the Human Rights Committee.<sup>367</sup>

The indivisibility of human rights is also important in the context of forced or compulsory labour when taking into account not only the civil and political rights protection but also the economic, social and cultural rights that are relevant to ensuring that individuals are not subjected to the forms of labour exploitation discussed thus far. For instance, Article 6 of the 1966 International Covenant of Economic, Social and Cultural Rights (ICESCR) which provides 'the right to work, which includes the right of everyone to the opportunity to gain his [or her] living by work which he [or she] freely chooses and accepts.' The provision in the ICESCR is not only enumerating an economic right to access the labour market but is also, according to Edwards, an anti-forced labour provision complementing the civil and political provisions that are remunerated in Article 8 of the ICCPR.<sup>368</sup>

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<sup>363</sup> Maul (2011), *supra* n.314, p. 316.

<sup>364</sup> Maul (2011), *supra* n.314, p. 319.

<sup>365</sup> UN General Assembly (1955), *supra* n.219, p. 93

<sup>366</sup> Article 40, International Covenant of Civil and Political Rights; Optional Protocol to the International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 9

<sup>367</sup> Edwards (2007-2008), *supra* n.9, p. 26.

<sup>368</sup> Edwards (2007-2008), *supra* n.9, p. 27. It is acknowledged that UN CEDAW Committee are in the process of drafting a General Comment on Trafficking in Women and Girls as discussed in Chapter 2.

Furthermore, acknowledging the protection from labour exploitation afforded by economic, social and cultural human rights, and borrowing Edwards analytical stance, this thesis contends that Article 7 of the ICESCR can also be categorised as an anti-labour exploitation provision:

*The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:*

*(a) Remuneration which provides all workers, as a minimum, with:*

*(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;*

*(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;*

*(b) Safe and healthy working conditions;*

*(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;*

*(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.<sup>369</sup>*

When it comes to the implementation of these provisions, State parties are not required to fulfil their obligations in an absolute manner, since these rights can be subject to some exceptions and progressive implementation according to available resources.<sup>370</sup> Nevertheless, it is important to note that these provisions hold great significance when it comes to clarifying the meaning of labour exploitation and ensuring that the law available is applied in order to disrupt labour exploitation in the labour market. Indeed, one significant factor of labour exploitation is that many individuals enter voluntarily into a contract of employment but then the working conditions are in breach of the ICESCR provisions discussed above. As a result, in some instances, the employment relationship could amount to labour exploitation. A State must ensure that the national framework is suitably developed to protect against these

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<sup>369</sup> Article 7, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, UNTS, vol. 993, p. 3.

<sup>370</sup> For discussion on limitations in Article 2 ICESCR regarding progressive implementation, absolute prohibition of discrimination and application to non-nationals in developing countries see Edwards (2007-2008), *supra* n.9, p. 28.

abuses, including judicial mechanisms and labour market regulation.<sup>371</sup>

The international and regional human rights legal framework demonstrates that the prohibition of forced labour is first and foremost a violation of basic human rights principles, and its criminalisation is a step towards its eradication. In addition, the prohibition refers to all persons, irrespective of their migration status, as it constitutes an extreme form of abuse and exploitation. Such disregard and lack of respect for individuals is not only harmful to workers, but also, as highlighted by Lewis et al, ‘in turn, generates downward pressure on wages and conditions through what is known as the race to the bottom.’<sup>372</sup>

The next section will consider how and to what extent the parameters of this form of exploitation have been further delineated in a judicial context, in light of the contemporary setting and the shift from state-sponsored activity to one enacted in the private labour market economy, an issue that has been extensively addressed in literature.<sup>373</sup> Piotrowicz particularly emphasises the perspective of the ‘the traditional vertical application of human rights law between state power and the individual,’<sup>374</sup> as with other human right violations that are committed by non-state actors, he emphasises that the role of human rights law must adapt to ensure that States undertake appropriate protection measures in order to respect and fulfil their obligations.<sup>375</sup> Cullen supports this perspective, since such an approach will require more than the mere prohibition of the practices outlined in the treaties,<sup>376</sup> is also obliges States to legally discourage and prevent enslavement, forced labour and servitude perpetrated by non-state actors, as well as to protect those at immediate risk.<sup>377</sup> Whilst it is acknowledged that the considerations regarding positive obligations, as illustrated by these latter points, is of crucial importance when it comes to making the law practical and effective, rather than theoretical and illusory; the focus in the present thesis will be upon the substantive

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<sup>371</sup> Edwards (2007-2008), supra n.9, p. 28. Also supported by Chuang who calls for focus on socio-economic approach. Chuang (2006), supra n.358, p. 157.

<sup>372</sup> Lewis et al (2015), supra n. 299, p. 3.

<sup>373</sup> See on the shift of forced labour from state sanctioned to private economy activity in Allain (2013), supra n.1, p.106 Ollus (2015), supra n.1, p. 229. ILO, *Global Estimate of Forced Labour 2012: Results and Methodology*, Geneva, 2012; Hadijatou Mani [2008] supra n.67, para 77 for Piotrowicz this case is important for what it tells us about state responsibility under human rights law for what are, essentially, private acts: Piotrowicz (2012), supra n.58, p. 191.

<sup>374</sup> Piotrowicz, R., ‘The legal nature of trafficking in human beings’, (2010) *Intercultural Human Rights Law Review* 4, 175 – 203, p. 191-192.

<sup>375</sup> Piotrowicz (2010), supra n.374, p. 195.

<sup>376</sup> Cullen (2006), supra n.245, p. 588.

<sup>377</sup> Piotrowicz (2012), supra n.58, p. 183 & 187.

articulation of the prohibited practices as opposed to the scope and nature of the positive obligations on States.<sup>378</sup> As will be demonstrated by the presentation of the most pertinent cases of regional human rights law, seeking to minimise the diversity of understandings as to what is to be prohibited in national settings, is still a topic for further consideration.

## **5. Judicial interpretation of the legal parameters of forced or compulsory labour**

The jurisprudence engaging with the concept of forced or compulsory labour has reinforced the definition elaborated in ILO Convention 29 providing further clarity of the meaning of the three main definitional elements we outlined in Section 1. However, ILO research on the judicial adjudication of forced or compulsory labour in courts reveals that, in some instances, the courts have used their judicial freedom to develop their own tests for determining the involuntary nature of labour.<sup>379</sup> The discussion of the judicial interpretation of the legal parameters of forced or compulsory labour will therefore consider the case-law that provides assistance on the legal understanding of when the provision of work or services becomes forced labour, but with particular emphasis on two of the three constituent elements: i) menace of penalty; and ii) involuntariness. The analysis of the case-law will highlight the necessity of the existence of *both* a menace of penalty *and* involuntariness for the provision of work or services to be forced; yet there is, in practice, a relationship of reciprocity between the two elements. Quite simply, this thesis contends that the impact of a menace of penalty (often achieved by means of indirect coercion) leaves an individual with no choice but to submit to the provision of forced labour.

### **5.1 Menace of penalty: a threat exacerbated by a position of vulnerability**

The menace of penalty element has been likened to both direct and indirect forms of coercion, as we discussed in Section 1.<sup>380</sup> However, where factual circumstances do not present clear indicators of direct coercion, it is sometimes difficult for courts to grapple

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<sup>378</sup> For an excellent and comprehensive overview of the positive obligations on states to ensure the effective prohibition of forced or compulsory labour, servitude, slavery and practices similar to slavery see Stoyanova (2017) *supra* n. 162.

<sup>379</sup> ILO (2009), *supra* n.67, p. 5.

<sup>380</sup> See Inter-American Court case *Ituango Massacres v Columbia* [2006], in Allain (2013), *supra* n.1, p. 220. The menace of penalty in the most extreme form = the direct and implicit threat of physical violence or death addressed at the victim or next of kin. The real and actual presence of a threat, which can assume different forms and degrees, of which the most extreme are those that imply coercion, physical violence, isolation or confinement or the threat to kill him or the next of kin.

with indirect forms of coercion.<sup>381</sup> To this end, *Siliadin* [2005], provided further clarity of the exact parameters of the meaning “menace of any penalty.”<sup>382</sup> The reasoning of the Court was particularly useful for migrant workers who may find themselves in a situation whereby they are reliant upon their employer to secure their migration status. Following on from the ILO Committee of Expert’s submission that menace of any penalty does not require penal sanctions but can also include loss of rights or privileges, the Court acknowledged that the threat of police arrest could be deemed to constitute an *equivalent* threatened penalty.<sup>383</sup> The Court identified a number of factors of the applicant’s situation that led to extreme vulnerability, amounting to a menace of penalty.<sup>384</sup> In particular, the fact that the applicant was a minor, irregularly resident and dependent upon her employer’s for regularising her migration status, did not amount to a threat of a ‘penalty’ but was, in fact, an equivalent situation in terms of the perceived seriousness of the threat.<sup>385</sup>

## 5.2 Involuntariness: a disproportionate burden or a lack of alternative?

The case law affirms Gallagher’s assertion that the concept of voluntariness is central to the definition of forced labour.<sup>386</sup> Nevertheless, the case-law analysis reveals that the method for determining involuntariness has been given different emphasis in different judicial contexts. The ECtHR in *Van der Musselle v Belgium* [1983] stated that, for a violation of Article 4, a mere lack of willingness alone is not sufficient to amount to involuntariness. Instead, the service required must have ‘imposed a burden which was so excessive or disproportionate to the advantages attached to the future exercise of that profession’ that it ‘could not be treated as having been voluntarily accepted beforehand.’<sup>387</sup> Alternatively, instead of identifying involuntariness as amounting to a disproportionate burden, the ICTY in *Prosecutor v. Krnojelac* [2002] emphasised that involuntariness is to be determined on a case by case basis taking into account the lack of alternative the individual faces given the circumstances:

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<sup>381</sup> ILO (2009), supra n.67, p. 5.

<sup>382</sup> Piotrowicz (2012), supra n.58, p. 190.

<sup>383</sup> ILO (2007) supra n.309, para 37; *Siliadin* [2005], supra n.129, para. 118; Mantouvalou V., ‘Employment and Discrimination: treatment of unpaid household servant, Case Comment: *Siliadin v. France*’, (2005) *European Human Rights Law Review* 6, 660-664, p. 664.

<sup>384</sup> ILO (2009), supra n.67, p.30.

<sup>385</sup> *Siliadin* [2005], supra n.129, para. 118.

<sup>386</sup> Gallagher (2008), supra n. 55.

<sup>387</sup> *Van Der Musselle* [1983], supra n.311, para 37.

*[Involuntariness is a] factual question which has to be considered in light of all the relevant circumstances on a case by case basis... What must be established is that the relevant persons had **no real choice** as to whether they would work [emphasis added].*<sup>388</sup>

Both of these cases offer insight into the extent to which the provision of work or services was involuntarily and thus amounted to forced labour can be identified. The more recent cases of *Chowdury* [2016] and *Brasil Verde* [2016] are further indicative of the contemporary understanding of forced or compulsory labour, particularly in relation to workers who are extremely dependent upon their employers due to, *inter alia*, irregular migration status, geographical isolation, and/or economic compulsion.

The ICTY's assessment of the "inability to change circumstances" as being closer to servitude, was also reinforced by the Inter-American Court of Human Rights in the *Brasil Verde* case, where the Court highlighted the fact that because the workers' movements are controlled and their freedom of movement denied, the legal concept of forced labour, is closely related to other abusive practices including human trafficking, slavery and slavery-like practices, debt bondage or bonded labour, and labour exploitation.<sup>389</sup> The ECtHR however, in *Chowdury* stated that restriction of movement is not a condition *sine qua non* for classifying forced labour.<sup>390</sup> Such a position was in stark opposition to the domestic authorities who had held that the workers did not have their freedom of movement sufficiently restricted to amount to forced labour as in their free time, the workers were able to move around the region, go shopping and play cricket, meant that they were not forced to work against their will and could have left the situation at any moment.

In *Chowdury*, the Court referred to the proportionality test in *Van der Mussele*, clarifying that it is necessary for any assessment of proportionality to refer to all circumstances on a case-by-case basis.<sup>391</sup> In particular, the workers' vulnerability

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<sup>388</sup> *Prosecutor v. Krnojelac*, Case No. IT-97-25 (15 March 2002), para 359.

<sup>389</sup> Inter-American Commission on Human Rights (2015) *Human rights of migrants, refugees, stateless persons, victims of human trafficking and internally displaced persons: Norms and standards of the Inter American Human Rights System*, para 277, <http://www.oas.org/en/iachr/reports/pdfs/HumanMobility.pdf>

<sup>390</sup> *Chowdury* [2017], supra n.100, para 123.

<sup>391</sup> *Van Der Mussele* [1983], supra n.311, para. 96.



arising from their undocumented status led to the Court reasoning that prior consent to the working conditions was irrelevant due to the employer's abuse of the position of vulnerability, which was exacerbated by their lack of financial means and the risk of detention or deportation should they contact the authorities.<sup>392</sup> Thus, the jurisprudence reveals that the assessment of involuntariness must not only be made on an objective basis but also according to the individual's personal conviction.<sup>393</sup> Such an objective standard, as Rijken also notes, aligns the concept of consent in the context of forced or compulsory labour with that of human trafficking, that is, any consent is irrelevant where a means is used, which will be the starting point of the next section that considers its reciprocity with the menace of penalty.<sup>394</sup>

### 5.3 The reciprocity of menace of penalty and involuntariness

The concept of voluntariness is central to the definition of forced labour,<sup>395</sup> but nevertheless overlaps with the menace of penalty element.<sup>396</sup> The case-law analysis has demonstrated that it is necessary for the existence of both a menace of penalty and involuntariness for the provision of work or services to be considered forced labour. Therefore, it is contended that there is a relationship of reciprocity between the two elements: namely, the impact of a menace of penalty (often achieved by means of indirect coercion) leaves an individual with no choice but to submit to the forced labour. The following cases demonstrate the extent to which such reciprocity means that, in some instances, the two constituent elements are interconnected.

The factual circumstances in *Krnojelac* were considered to amount to a menace of penalty (threat of punishment in the event of refusing to work) that made it impossible for any expression of free consent (impossible for an objection to the work to be voiced). In addition, the coercion (menace of penalty) created a 'climate of fear' rendering the work involuntary.<sup>397</sup> Subsequent cases have affirmed that where such a

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<sup>392</sup> *Van Der Mussele* [1983], supra n.311, para. 97.

<sup>393</sup> *Krnojelac*, [2002], supra n.388, para 195.

<sup>394</sup> Rijken, C., 'When bad labour conditions becomes exploitation: lessons learnt from Chowdury case', in Rijken, C., & de Lange, T., (eds) *Towards a decent labour market for low waged migrant workers*, (Amsterdam University Press, 2018), p.197.

<sup>395</sup> Gallagher (2008), supra n. 55.

<sup>396</sup> ILO (2007), supra n 309, paras 38-40.

<sup>397</sup> *Krnojelac* [2002], supra n.388, para 194.

climate of fear prevails, even if the worker has the opportunity to leave, the fear of harm would prevent them from leaving.<sup>398</sup>

Similarly, whilst the notion of ‘economic compulsion’ in and of itself, has not been accepted by the ILO Committee of Experts as constituting forced or compulsory labour, where such compulsion is attributed to an employer who is perpetuating the economic constraints on an individual(s), leaving them with no alternative, then this would be sufficient to amount to forced labour. In *Chowdury*, the domestic authorities initially held that the promised wages below the minimum wage, did not amount to deception or abuse of workers’ vulnerability because of the systemic underpayment of the minimum wage in the sector.<sup>399</sup> A written submission by the International Trade Union Confederation also considered whether or not persistent and deliberate withholding of wages was sufficient for menace of penalty and met the threshold of the Article 4. The Court, in contrast to the domestic authorities, held that the menace of penalty emanated from the inability of the individuals to seek employment elsewhere and as such there was no possibility to leave the situation without falling into severe precarity. In particular, the Court took note of the fact that the workers felt obliged to continue to work, knowing that if they stopped working they would not receive the wages owed to them, in the context that they had no other means of subsistence.<sup>400</sup>

Such economic compulsion had been previously considered by the Supreme Court in India in 1982, in which it held that:

*Any factor that deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as ‘force... He would be in no position to bargain with the employer; he would have to accept what is offered to him. In doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances, and the labour of service provided by him would be clearly ‘forced labour’.*<sup>401</sup>

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<sup>398</sup> ILO (2009), supra n.67, p. 26. See also discussion on climate of fear in European Union Agency for Fundamental Rights, *Protecting migrant workers from exploitation in the EU: workers’ perspectives* (June 2019), p.87.

<sup>399</sup> *Chowdury* [2017], supra n.100, para 24. Discussed in Muskat-Gorska (2017), supra n.338, p.462.

<sup>400</sup> *Chowdury* [2017], supra n.100, paras 95 & 97. See discussion on economic need and dependence in FRA (2019), supra n. 398, p. 70 & p.77.

<sup>401</sup> *People’s Union for Democratic Rights v. Union of India*, A.I.R. 1982 S.C. 1473 (19 September 1982).

The Indian Supreme Court considered such compulsion to emanate from the lack of alternative but to accept remuneration for less than the minimum wage. As has been mentioned above, the position of the Supreme Court that any work for less than the minimum wage constitutes forced or compulsory labour was not taken up by the ILO Committee of Experts as the commission of forced or compulsory labour requires the identification of all constituent elements.<sup>402</sup> The assessment of the factual circumstances in *Chowdury* led to such an interpretation. Namely, that the situation, amounted to menace of penalty and involuntary situations. The employer's actions meant that only continuing to work without payment gave them hope of receiving their back pay, whereas taking the choice to quit their workplace would not only abandon any recuperation of back pay but would also amount to facing destitution, detention, and/or deportation. The workers were subjected to a climate of fear that was evidenced by the impunity of farmers and daily presence of guards etc. threats of violence as punishment for insubordinate workers.<sup>403</sup>

## 6. Concluding remarks

Forced or compulsory labour is a standalone form of labour exploitation that has been adapted to the contemporary context not just through judicial adjudication but through the adoption of new contemporary legal instruments. The approach to ensuring that the prohibition of forced or compulsory labour is well implemented is largely in recognition of the contextual shift wherein exploitation now predominantly occurs in the private economy and is no longer a State sponsored activity. The subsequent indicators and additional legal instruments offer insight into how exploitation should be understood, with a particular focus on the forms of coercion and the irrelevance of consent.

The judicial engagement with forced or compulsory labour – albeit limited - has provided critical insight into the key features of exploitation that are in some situations reciprocal (see for example Section 5.3) and ultimately reinforce the exercise of control that fosters a lack of viable alternatives – all features that have been identified in relation to the other forms of exploitation, namely, slavery, slavery like practices and servitude.

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<sup>402</sup> ILO (2009), supra n.67, p. 43-44.

<sup>403</sup> *Chowdury* [2017], supra n.100, para 117. Further discussed in Muskat-Gorska (2017), supra n.338, p.462.



## **CHAPTER 4 – Taking stock of the state-of-the-art legal analysis of labour exploitation**

### **0. Introduction and structure of the chapter**

The state-of-the-art of labour exploitation in international and regional law illustrates the international community's engagement with the prohibition of the most egregious forms of exploitation and affirms Allain's assertion that 'labour exploitation is hardly a novel phenomenon.'<sup>404</sup> We consider, nevertheless, that conceptual difficulties that are detrimental to legal certainty exist illustrating that legal clarification of exploitation in both law and policy remains a necessary task. As such, the first part of this Chapter distills the key elements of exploitation that have emerged from the legal analysis and will begin to identify those cross-cutting elements that exist regardless of the form of exploitation (Section 1).

Once we have taken stock of the state-of-the-art understanding of labour exploitation in law - and bearing in mind the overall goal of clarifying the legal understanding of exploitation - we will also take into account the legal developments both on the books and in practice as well as the academic scholarly debate. From this analysis we will discuss the key obstacles that continue to hinder the legal clarification

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<sup>404</sup> Allain (2013), *supra* n.1, p.340-341.

of exploitation. Thus, providing a response to the following subsidiary research question: *What are the obstacles to the legal clarification of labour exploitation?*

Previous chapters reveal that the historical legal development of labour exploitation has been stunted by competing geopolitical interests where state policies have held sway, as can be shown by the omission of servitude from the supplementary slavery convention and the State-sanctioning of forced or compulsory labour under certain conditions.<sup>405</sup> We have identified three main obstacles to a legal clarification of labour exploitation in law that have emerged from the analysis of the legal framework and literature review. We argue that the existence of these moral, legal and political obstacles continues to exacerbate contemporary efforts to tackle exploitative working practices, thus further emphasising that exploitation still needs to be addressed in both academia but also in practice.

The first obstacle is the focus on the prohibition of human trafficking in criminal law (Section 2). This is a *legal obstacle* that has seen the international community's efforts be dominated by an emphasis on anti-trafficking initiatives that strongly advocate a criminal justice approach, whereby criminalisation and prosecution are prioritised.

The second obstacle is the neo-abolitionist influence on law and policy developments (Section 3). This is a *moral obstacle* that has not only strongly influenced the anti-trafficking legal regime, particularly with an emphasis on the criminalisation of human trafficking for sexual exploitation but is also present in more recent discussions on modern slavery.

The third obstacle is the marginalisation of labour exploitation through political inertia and a tolerance of exploitation (Section 4). This is a *political obstacle* that explores the side-lining of labour exploitation in law and policy and the impact that this has on a tolerance of exploitative labour practices.

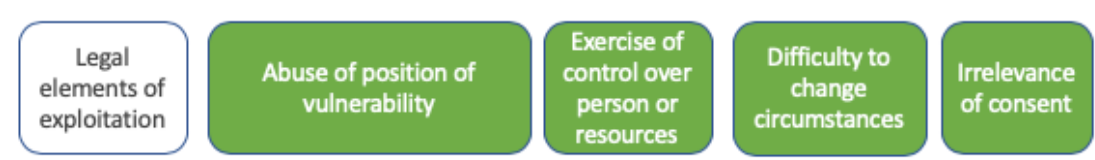
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<sup>405</sup> On servitude see Allain (2008), *supra* n.209, p. 229. On forced or compulsory labour see Lee, M., 'Introduction: Understanding human trafficking,' in Lee, M. (ed.) *Human Trafficking*, (Devon: Willan Publishing, 2007). p. 14.

The more detailed discussion of these obstacles illustrates that it is not possible to place them in a hierarchy of importance or, indeed, of causation. In fact, these obstacles are very much interrelated and the continuance of one can be fostered by another. As a result, the solution to these obstacles must be comprehensive. Law alone is not the answer. Thus, whilst this thesis suggests that a legal conceptualisation of labour exploitation can go some way towards overcoming some of the obstacles, it must not work in isolation, if it is to be effectively applied.

### 1. The elements of exploitation emerging from the state-of-the-art legal analysis

The purpose of this section is to present the four cross-cutting elements of exploitation that have been identified from the state-of-the-art legal analysis of the existing prohibited forms of labour exploitation: abuse of a position of vulnerability; exercise of control; difficulty to change circumstances and irrelevance of consent.



*Table 1: The building blocks of exploitation: the legal elements of exploitation emerging from the state-of-the-art analysis*

A position of vulnerability is a crucial starting point from which the relationship between two parties may become exploitative. However, a position of vulnerability is not enough, it must be abused. This standpoint emerges from the means element of the trafficking definition which includes an **abuse of position of vulnerability** (Section 2.1, Chapter 1). A position of vulnerability, although not explicitly referred to in the definition of the other forms of exploitation does emerge as part of the judicial reasoning in the context of the menace of penalty in forced or compulsory labour. For instance, in *Siliadin*, the menace of penalty element was identified due to the large number of factors of the applicant’s situation that amounted to extreme vulnerability (Section 5.1, Chapter 3). Indeed, the means by which the menace of penalty arises is very similar to that of the abuse of position of vulnerability, namely, the use of direct

and indirect forms of coercion (Section 1, Chapter 3).

The means by which an abuse of position of vulnerability or indeed a menace of penalty is achieved is the focus of the second element that has emerged from the legal analysis: **the exercise of control**. The notion of control predominantly emerges from the jurisprudence of slavery with the ICTY appeal chamber in *Kunarac* including control in the list of indicators of powers attaching to the right of ownership. This was affirmed in *Tang* and *Brasil Verde* where the courts referred to the power to control and restrict movement (see Section 3.3., Chapter 2). The interpretation of ownership as control has also been the emphasis in academic scholarship that seeks to better understand the *de facto* condition of slavery by way of a property paradigm that emphasises the notion of control through possession. The jurisprudence of the European Court then further extended the understanding of control in *CN & V v France* to all forms of exploitation prohibited under Article 4 ECHR. More recently, in the context of forced or compulsory labour, the European Court in *Chowdhury* revealed that the exercise of control can amount to dependency and as such does not require a complete deprivation of liberty. Overall, the judicial engagement with the notion of control is indicative of a contemporary judicial understanding of labour exploitation.

Whilst the exercise of control is an extra-judicial feature of the legal analysis, it does closely interact with the third element of exploitation that has emerged in all forms of exploitation discussed thus far: a **difficulty to change circumstances**. The legal articulation of this element can be discerned from the *travaux préparatoires* of the Palermo Protocol which provided guidance as to the meaning of the abuse of position of vulnerability, wherein the concept was considered to refer to a situation that leads to *no real or acceptable alternative* (Section 2.2, Chapter 1). Similarly, the difficulty to change circumstances is explicitly included in the judicial understanding of servitude in *Van Droogenbroeck* where one of the conditions requires that there is an *impossibility to alter their condition* (Section 4, Chapter 2). The difficulty to change circumstances is also present when in forced or compulsory labour the menace of penalty has left the individual with *no choice but to submit* to the involuntary provision of work or services (Section 5, Chapter 3).

All of the manifestations of the third element that have emerged from the legal



analysis, although articulated in slightly different ways, all lead to the final element: **the irrelevance of consent**. Ultimately, the extent to which someone is able to reject an offer and/or is free to leave the exploitative circumstances depends upon the extent to which they are able to exercise agency (Section 2.2, Chapter 1). By virtue of the cumulative effect of the three above elements, the principle of irrelevance of consent is either explicitly or implicitly included in all forms of exploitation discussed thus far. In the human trafficking definition, irrelevance of consent is explicit, whereas in the other forms of exploitation there is an emphasis on the involuntariness that is confounded by the use of the means such as coercion or deception (Section 1, Chapter 3). The assessment of the irrelevance of consent is difficult since the complexity of exploitative working conditions, in some instances, makes it difficult to determine where an individual as willingly consented or is in fact in an involuntary position (Section 2.2, Chapter 1). Here, the assessment in practice of the irrelevance of consent is facilitated by indicators (see Section 1, Chapter 3 for discussion of ILO Indicators) or through a test of proportionality, that requires a disproportionate burden (see *Van der Mussele v Belgium* in Section 5.2, Chapter 3). Here again, the irrelevance of consent is closely interconnected with other elements discussed above. For instance, another judicial interpretation required that the determination of involuntariness must take account of the extent to which an individual had no real choice (see *Prosecutor v. Krnojelac* in Section 5.2, Chapter 3).

Thus far, the presentation of the elements of labour exploitation that can assist in determining the material scope of the concept have clearly indicated that they are reciprocal and intertwined, thus adhering to an understanding of exploitation as a process. The crucial point of interest here when it comes to the overall objective of this thesis is that whilst there are commonalities between the different forms of exploitation, there has not yet to date been an attempt, either in practice or in scholarship, to define the concept of exploitation (see the discussion in Chapter 1 on the impact of a lack of definition of exploitation on human trafficking law). However, the presentation of the legal elements of exploitation that have emerged from the analysis thus far suggests that it is possible to clarify the concept of exploitation in law. In the next section, taking into account the entirety of the legal analysis thus far, we will outline some of the key obstacles to such legal clarification.

## 2. The focus on criminal law responses for human trafficking: a legal obstacle

Despite the legacy of the prohibition of slavery, servitude and practices similar to slavery, the judicial adherence to a very traditional understanding of these forms of exploitation can be attributed to the international legal regime's advancement of a global movement against human trafficking. The Palermo Protocol is hailed as a leading global anti-trafficking standard that for Gallagher demonstrates 'an increased acceptance on the part of States that severe exploitation, even that which takes place within the private sphere, is indeed a matter for public concern and international regulation.'<sup>406</sup> To this end, it can be said to have had a chilling effect on further efforts to tackle exploitation without trafficking. Indeed, anti-trafficking academic and policy discourse has flourished on an unprecedented scale since the 2000 Palermo Protocol.<sup>407</sup> We consider that one limitation of the emphasis on human trafficking by the international community has led to governments defining exploitative situations as either human trafficking or not. The result of which has limited attempts to enhance the legal understanding of labour exploitation by further engaging with established concepts of forced labour and slavery. For example, Skrivankova emphasises the focus on the centrality of exploitation in certain legal frameworks.<sup>408</sup> The "actual exploitation" is a status or condition, which is intrinsically linked to the process of human trafficking but is ultimately the end result. There are many paths by which a person arrives in a situation of exploitation.<sup>409</sup> Therefore, it is important that responses are designed to react to the "actual exploitation" rather than the journey, especially as it is not only those in an irregular position who are at risk,<sup>410</sup> but also those regular workers in the formal economy who may nevertheless be 'subject to extensive rights violations, including confinement, passport confiscation, non-payment of wages, and physical violence or its threat.'<sup>411</sup> Importantly, it can be further argued that voluntarily assumed migratory journeys or voluntarily assumed recruitment that result in forced or exploitative labour conditions could in fact satisfy the definition of the Palermo

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<sup>406</sup> Gallagher (2009), *supra* n. 140, pp. 824-825.

<sup>407</sup> Despite the issue coming to the attention of the international community at the end of the 1990s, see Holmes, L., (ed) *Trafficking and human rights – European and Asia-Pacific Perspectives* (Edward Elgar, 2010), p. 5.

<sup>408</sup> Skrivankova (2010), *supra* n. 50, p.12..

<sup>409</sup> Allain & Bales (2012) *supra* n.254, p. 2; Rijken (2013), *supra* n.56, p. 13.

<sup>410</sup> For discussion on legal distinction between smuggling and human trafficking, and those who willingly embark upon a journey in search of better job opportunities see Goodey, J., 'Human Trafficking: Sketchy Data and policy responses' (2008) *Criminology and Criminal Justice* 8, 421-442, p. 423.

<sup>411</sup> O'Connell Davidson (2010), *supra* n.58, p. 249.

definition where deceit, fraud or abuse of power or vulnerability is involved.<sup>412</sup> Our analysis of the case law reveals that such circumstances are in fact faced by the judiciary where they are to apply a domestic criminal prohibition of human trafficking that does not include the means as a constituent element (discussed in Chapters 8 & 9). With this in mind, any subsequent analysis of future interventions should, therefore, focus on the outcome, namely the working conditions, that may or may not amount to human trafficking, forced labour or slavery, but does amount to labour exploitation.<sup>413</sup>

The ramifications of the global focus on human trafficking as an international crime, stemming from the Palermo Protocol's global definition and the creation of remedies through the criminal law have not gone unnoticed. Its focus on human trafficking has promoted a partial perspective that does not address all manifestations of exploitation.<sup>414</sup> The legal impact is that 'the trafficking definition thus amounts to a significant retreat from the already agreed upon prohibition of slavery [and] the emphasis on the criminalisation of human trafficking [...] has rendered the existing framework insufficient to address exploitation.'<sup>415</sup> Admittedly, one exception is the 2014 ILO Protocol that, as we have seen in the chapter on forced or compulsory labour sought to further strengthen its prohibition in international law. However, the ILO's adoption of a broad definition of forced labour as an inclusive definition has not gone unnoticed, with Jägers & Rijken critiquing the ILO approach as failing to recognise that not all forms of human trafficking qualify as a form of forced labour.<sup>416</sup>

The inclusion of slavery, servitude and forced or compulsory labour in the human trafficking definition did not supplement the understanding of labour exploitation. As we saw in Chapter 1, the drafting of the Protocol did not place significant emphasis on the meaning of labour exploitation. Subsequently, literature further emphasises that in fact the focus on the exploitation element of trafficking is very limited. As Ollus writes, the trafficking definition 'does not equate 'exploitation' [...] with trafficking, but is concerned only with prohibiting forms of dealing which

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<sup>412</sup> Edwards (2007-2008), supra n.9, p. 38.

<sup>413</sup> For more examples of proposal to focus on the situation of exploitation i.e. the forced labour element rather than the movement element see Anti-Slavery International, *Trafficking for forced labour in Europe: Report on a study in the UK, Ireland and the Czech Republic and Portugal*, (November 2006), p. 7.

<sup>414</sup> Hathaway (2008) supra n. 205, pp. 4-5.

<sup>415</sup> Baer, K., 'The Trafficking Protocol and the Anti-Trafficking Framework: Insufficient to address exploitation', (2015) *Anti-Trafficking Review*, 4, 167, p. 167.

<sup>416</sup> Jägers, N., & Rijkens, C., 'Prevention of human trafficking for labour exploitation: the role of corporations' (2014) *Northwestern Journal of International Human Rights* 12(1), 47-73, p. 49.

facilitate or lead to exploitation.’<sup>417</sup> Consequently, Wijers draws attention to the fact that there is no obligation flowing from the Palermo Protocol to do anything about the condition of being exploited, much less to provide a remedy to exploited persons.<sup>418</sup> This is also reinforced by O’Connell-Davidson who writes:

*In practice, the restriction of a person’s choices and freedom of movement through violence, or its threat, is taken as the real and unique evil of ‘trafficking’. Exploitation, which is so hard to define, is left to one side.*<sup>419</sup>

As such, Stoyanova recalls that the commonality of the trafficking situation – regardless of purpose or causes – is the method of transportation, clandestine movement, and the form of coercion or deception employed.<sup>420</sup> Such a position stands in sharp contrast to the traditional legal understanding of the duty to end slavery, which, as Hathaway reminds us requires an end to the condition of slavery as such (and not just to the forms of dealing that lead to it).<sup>421</sup>

The Palermo Protocol definition entrenches this position by the fact that the existence of an *aim* to exploit is sufficient to qualify as a case of human trafficking without the need of the *actual* exploitation taking place. The result being that the focus of the constituent elements is on forced recruitment.<sup>422</sup> Whilst, the forms of labour exploitation explicitly included in the human trafficking definition, are the outcomes of the process of human trafficking; the non-exhaustive categorisation of forms of labour exploitation in the Palermo Protocol raises further questions. Namely, as summarised by Jägers & Rijken: when does decent work evolve into a form of forced labour and under what conditions can this be considered to fall in the scope of human trafficking?<sup>423</sup> The ILO guidance on the interpretation and application of the forced labour definition,<sup>424</sup> can assist to a certain extent, however, such guidance does not apply to labour exploitation in context of human trafficking, which as previously stated can amount to

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<sup>417</sup> Ollus (2015), *supra* n.1, p. 237.

<sup>418</sup> Wijers (2015), *supra* n.12, footnote 34.

<sup>419</sup> O’Connell Davidson (2010), *supra* n.58, p. 252-253.

<sup>420</sup> Stoyanova (2014) *supra* n. 108, p. 422.

<sup>421</sup> Hathaway (2008) *supra* n.205, pp. 10-11.

<sup>422</sup> Rijken (2013), *supra* n.56, p. 13.

<sup>423</sup> Jägers & Rijken (2014), *supra* n.416, p. 50; Rijken (2013), *supra* n.56, p. 10, footnote 9.

<sup>424</sup> For discussion on ILO 2005 and ILO 2012 Global estimate see Jägers & Rijken (2014), *supra* n.416, p. 49.

more or less than forced or compulsory labour.<sup>425</sup> Such a gap brings us full circle and reinforces the problem posed by the lack of ‘clarity on the distinction between bad labour conditions [and] exploitation.’<sup>426</sup>

In order to address this lacuna, Edwards argues that labour exploitation requires different responses that the Palermo Protocol’s definition cannot provide.<sup>427</sup> The focus on the actions and the means rather than the exploitation, influences how governments and policy makers conceive of human trafficking as a criminal justice issue, migration issue and labour issue; which will consequently impact upon the status of the victims (irregular migrants, victim of crime, a human rights victim or (migrant) worker) and the level of protection they should receive.<sup>428</sup> In this regard, Shamir laments the non-elaboration of the scope of exploitation as it has led to the lack of consideration of the ‘structural labour market components that enable trafficking,’ both in implementation and during the negotiations of the Palermo Protocol due to the absence of representation of a labour approach to trafficking.<sup>429</sup> Indeed, as can be ascertained from the previous chapters, States have mainly focused upon the criminalisation of human trafficking, resulting in a failure to criminalise the standalone forms of exploitation. Ultimately, abuses where there are no elements of recruitment, transportation, transfer etc. by means of deception or coercion, remain unchallenged.<sup>430</sup>

Another concern of the focus on criminalisation of human trafficking is the focus on the exploiter. In their study of forced labour in Europe, Balch highlights the emphasis on prosecution by way of capturing the crime through the action and the means element side-lines the victim focus, due to the decreased prevalence afforded to the exploitation suffered.<sup>431</sup> Instead, as Haynes explains, the victim’s role is very much focused upon securing a successful prosecution:

*For a victim of human trafficking to be recognised at all as such, there were now conditions: she has to regard herself as a victim, she has to prove that she is one, and*

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<sup>425</sup> For analysis of the article 4 jurisprudence of the ECtHR and the missed opportunity to deal with an explanation of labour exploitation, rather than addressing human trafficking see Stoyanova (2012), *supra* n.121, p. 281

<sup>426</sup> Jägers & Rijken (2014), *supra* n.416, p. 50.

<sup>427</sup> Edwards (2007-2008), *supra* n.9, p. 15 & p. 46.

<sup>428</sup> Edwards (2007-2008), *supra* n.9, p. 52.

<sup>429</sup> Shamir (2012), *supra* n.193, p. 91.

<sup>430</sup> Stoyanova (2014), *supra* n. 108, p. 407.

<sup>431</sup> Balch (2013), *supra* n.342, p. 58-59.

*most importantly, she has to take on the role of assisting with the prosecution of her trafficker. If she does not, she is not considered a victim of human trafficking as a matter of law. At the point at which she makes a claim that she is a victim, the abuse she suffered is no longer seen as a human rights issue-focused on the exploitation and the loss of human dignity-but rather as evidence of a crime, which can be used in support of securing a prosecution of her traffickers.*<sup>432</sup>

The criminal justice approach undoubtedly emanates from the positioning of the international prohibition of human trafficking in the context of transnational criminal law. Subsequent international and regional policy instruments have reinforced the victim centered approach, however, the emphasis remains very much on the prosecution of the perpetrator, which not only has significant implications on the victim but also requires proactive implementation of criminal law prohibitions by States in order to ensure that they do not remain merely symbolic (as has been discussed in Section 2.2, Chapter 1 regarding the failure of the criminal justice approach due to a stereotypical understanding of exploitation).<sup>433</sup>

Furthermore, Stoyanova and Borg Jansson have both criticised the focus on criminalisation of human trafficking, as by the very nature of the abuse already being committed, it fails to prevent such abuse and, as a result, is not necessarily the best tool of deterrence.<sup>434</sup> Additionally, research conducted by Anti-Slavery International found that criminalisation has perpetuated a number of issues that impact upon the clarification of labour exploitation including an emphasis on human trafficking for sexual exploitation and in the case of labour exploitation a focus on the irregular migration status and subsequent illegal employment.<sup>435</sup> Overall, as argued by Mantouvalou, the dominance of a criminal justice approach has increased the risk of labour exploitation as it is ‘a powerful rhetoric device but with limited normative scope.’<sup>436</sup>

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<sup>432</sup> See example of TWT in US in Haynes (2009), supra n.97, p. 42.

<sup>433</sup> For discussion on obligations on state to adopt national criminal laws to prohibit human trafficking see Eriksson, M., ‘The prevention of human trafficking – Regulating domestic criminal legislation through the European Convention on Human Rights’ (2013) *Nordic Journal of international Law*, 82, 339-368, p. 340; Stoyanova (2014) supra n. 108, p. 412. On criminal law reflecting a moral standard, Kangaspunta, K., ‘Was trafficking in persons really criminalised?’, (2015) *Anti-trafficking Review*, issue 4, 80-97.

<sup>434</sup> Stoyanova (2014) supra n. 108, p. 414; Borg Jansson (2015), supra n.94, p.111.

<sup>435</sup> Anti-Slavery International (2006), supra n.413, p. 3. See also Guild, E., & Minderhoud, P., (eds) *Immigration and Criminal Law in the European Union The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling in Human Beings* (Brill, 2006).

<sup>436</sup> Mantouvalou V., ‘Legal construction of structures of exploitation’ in Collins, H., Lester, G., & Mantouvalou V., (eds) *Philosophical Foundations of Labour Law*, (Oxford University Press, 2018), p. 188.

Therefore, whilst we acknowledge that trafficking for labour exploitation has received increased attention in recent years,<sup>437</sup> the dominance of human trafficking and the criminal justice approach acts as a barrier to securing effective counter measures to labour exploitation as the lack of definitional clarity impedes the possibility of moving beyond the criminal justice approach towards, as Dottridge writes a ‘multi-pronged strategy against extreme forms of exploitation.’<sup>438</sup> The neo-abolitionist movement has been mentioned in previous chapters as having influence on how contemporary approaches to combatting human trafficking and exploitation are framed. For instance, as we have seen in previous chapters with regards to the space given to labour exploitation in drafting the protocol (Section 1, Chapter 1). In the next section, we consider that ‘the neo-abolitionist effect’ sheds further light on the current status of labour exploitation in law, including the fact that it has been side-lined by an emphasis on the criminalisation of human trafficking.

### **3. The neo-abolitionist influences on law and policy developments: a moral obstacle**

Based upon our analysis of labour exploitation in international and regional law in Chapters 1-3, we are able to identify two factors that are the progeny of the neo-abolitionist movement and by consequence impact upon the possibility of legally clarifying exploitation in law. The first factor is the influence on the criminalisation of human trafficking for sexual exploitation and the second is the emergence of an expansionist discourse that coins all contemporary forms of labour exploitation as modern slavery.

First, we turn to the criminalisation of human trafficking for sexual exploitation. Despite the Palermo Protocol definition expanding the scope of exploitation to include specific types of labour exploitation, we assert that the dominance of human trafficking and the criminal justice approach (the legal obstacle) has been further entrenched by a ‘one-dimensional’ focus on sexual exploitation.<sup>439</sup> In literature, many scholars refer to

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<sup>437</sup> ILO Tripartite Meeting of Experts (2013), supra n. 126, p. 3.

<sup>438</sup> Rijken (2011), supra n.49, p.352. Gallagher (2017), supra n.76, p. 103; For discussion on need for definitional clarity for prosecution and investigation, and multi-pronged strategy against extreme forms of exploitation e.g, social protection, see Dottridge (2017), supra n. 273, pp. 59-60.

<sup>439</sup> Aronowitz (2013), supra n.92, p.36; Kotiswaran (2015) supra n.12, p.15-17.

trafficking for labour exploitation receiving less attention than human trafficking for sexual exploitation both at the drafting stages of the Palermo Protocol and indeed afterwards with regards to its implementation.<sup>440</sup> On this point we concur.

Both Chuang and Wijers reflect upon the impact of the neo-abolitionist lobby active in the field. This lobby was a dominant voice at the time of drafting the Palermo Protocol.<sup>441</sup> Chuang sees two outcomes of this lobbying efforts. First of all, instead of fostering international cooperation to combat human trafficking, the focus on sexual exploitation coupled with the confusion of legal standards resulting from a conflation of human trafficking with slavery ‘perpetuate[d] inconsistency and confusion regarding the legal definitions of trafficking’<sup>442</sup> as we have shown in Chapter 1 (Section 2). Indeed, the distinction between sexual exploitation and labour exploitation may also lead to a narrow understanding of sexual exploitation, which, according to Wijers, neglects to take into account the fact that those who are subjected to sexual exploitation in the sex industry are not recognised as possible victims of forced labour.<sup>443</sup> We agree with Chuang who states that ‘neo abolitionist legal reforms and the reductive narrative have promoted criminal justice responses that target prostitution and leave unquestioned the exploitative labour practices and migrant abuse that characterise the majority of trafficking cases.’<sup>444</sup>

As a second outcome of the neo-abolitionist focus on sexual exploitation, Chuang highlights the construction of ‘trafficking as a moral or social problem driven by social deviance or entrenched male patriarchy.’<sup>445</sup> The result of this moralistic perspective has meant that there has been no consideration of how to manage the consequences of ‘deep economic disparities between wealthy and poor communities and nations and by inadequate labour and migration frameworks’ that drive such a

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<sup>440</sup> Goodey (2008), *supra* n.410, p. 435; Wijers (2015), *supra* n.12; Jahnsen, S. O. & Skilbrei, M. L., ‘From Palermo to the Streets of Oslo: Pros and Cons of the Trafficking Framework’, (2015) *Anti-Trafficking Review*, issue 4, 156–160; Chuang (2006), *supra* n.358, p. 140; Chuang (2010), *supra* n.24, p. 1656; Weitzer (2015) *supra* n.48, p. 228; Shamir (2012), *supra* n.193, p. 78; Lee (2007), *supra* n.405, p. 4-5; Edwards (2007-2008), *supra* n.9, p. 38.

<sup>441</sup> Chuang (2010), *supra* n.24, p. 1672; Wijers (2015), *supra* n.12.

<sup>442</sup> Chuang (2010), *supra* n.24, p. 1706.

<sup>443</sup> Wijers (2015), *supra* n.12.

<sup>444</sup> Chuang (2010), *supra* n.24, p. 1659; Kotiswaran, P., *From Sex Panic to Extreme Exploitation: Revisiting the Law and Governance of Human Trafficking* in Kotiswaran, P., (ed) *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, Cambridge University Press, Cambridge, 2017, p.36; see also Jahnsen & Skilbrei (2015), *supra* n.435, pp.157-158; Gallagher, A., ‘Editorial: The Problems and Prospects of Trafficking Prosecutions: Ending impunity and securing justice’, (2016) *Anti-trafficking Review* Issue 6, 1-5.

<sup>445</sup> Chuang (2010), *supra* n.24, p. 1683.



complex phenomenon.<sup>446</sup> An outcome of the emphasis on the ‘moral’ nature of sexual exploitation means that the drive to better understand and generate awareness of labour exploitation is belated and has resulted in perpetuation of stereotypical understandings of human trafficking as seen in our first chapter on human trafficking as a consequence of the lack of a definition of exploitation (Section 2, Chapter 1).<sup>447</sup>

The focus on sexual exploitation is not the only contribution of the neo-abolitionist movement. A second contribution is the emergence of an expansionist discourse that coins all contemporary forms of labour exploitation as “modern slavery”. For Allain & Bales, the legal development of slavery that we saw in Chapter 2 can be attributed to the neo-abolitionist movement that has, according to them, driven the ‘renaissance of slavery.’<sup>448</sup> Indeed, it is undeniable that, as stated by Bassouini ‘slavery, slave-related practices, and forced labour are well-established violations of international law and constitute international crimes.’<sup>449</sup> However, we suggest that the influence of the neo-abolitionist movement is contrary to the restrictive legal interpretation of contemporary forms of labour exploitation. Neo-abolitionist proponents have a tendency to adopt an expansive and all-encompassing understanding of slavery under the guise of the non-legal term “modern slavery”<sup>450</sup> which, as Allain highlights, culminates in an ‘ever growing list of practices finding shelter under its umbrella.’<sup>451</sup>

Advocates of expansionism, most prominently Bales, argue in 2001 that an expansionist socio-legal understanding of the concept is deemed necessary in order to secure the dynamic nature of the definition, so as to be able ‘to capture new forms of slavery within its aegis.’<sup>452</sup> Furthermore, Datta & Bales consider an expansionist approach to be an opportunity to take into account the shift in social, economic and historical contexts and to overcome the discrepancies and confusion caused by the legal definition which act as a barrier to developing appropriate policy measures that could

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<sup>446</sup> Chuang (2010), *supra* n.24, p. 1683.

<sup>447</sup> For instance, research has shown that ‘the share of employers who would report an instance of trafficking into domestic work to the police is far below their sex-worker client counterparts (67% of Swedish and 71% of Thai clients) in IOM (2003), *supra* n. p. 36; see also, Chuang (2010), *supra* n.24, p. 1698.

<sup>448</sup> Allain & Bales (2012) *supra* n.254, p. 1.

<sup>449</sup> Bassouini (1991) *supra* n.298, p. 456-457.

<sup>450</sup> Gallagher (2009), *supra* n.140, p. 800. Bales & Robbins (2001), *supra* n. 226, pp. 21–23; Quirk, J., ‘The Anti-Slavery Project: Linking the Historical and Contemporary,’ (2006) 28 *Human Rights Quarterly*, 565, p. 568 .

<sup>451</sup> Allain (2008), *supra* n.209, xvii.

<sup>452</sup> Bales & Robbins (2001), *supra* n. 226, p. 42. See also discussion on the impact of expansionist discourse on contemporary understanding of slavery in: Quirk (2006), *supra* n.450, p. 578.

confront such practices.<sup>453</sup>

We understand that a narrow definition of slavery that does not take into account the wider sociological context of modern forms of slavery is undesirable. However, caution must be exercised to ensure that the interpretation of the international legal instruments is consistent with their objectives. For instance, Gallagher and Nicholson both refer to the *travaux préparatoires* to the 1926 Convention that clearly demonstrate that it was not intended to encompass all forms of exploitation.<sup>454</sup> That said, we do concede that, the previous chapters have shown the difficulties encountered by judicial bodies that have had the task of further defining the exact parameters of the practices prohibited by treaty; to the extent that despite its global prohibition, it has been suggested that slavery has been marginalised in law permitting its continuation, as McGeehan argues, ‘in a more acceptable form.’<sup>455</sup> Indeed, the case law demonstrates that slavery is in fact a form of labour exploitation that has been ‘imperfectly understood’<sup>456</sup> with the judicial reinforcement of a restrictive understanding of slavery that is still predicated upon the drafters’ reference to a ‘destruction of juridical personality’.<sup>457</sup> Despite hints at a more expansive understanding shifting away from the notion of “chattel slavery”, premised upon a property paradigm,<sup>458</sup> we have seen in previous chapters that the European Court is, as noted by Milano, in favour of a ‘older and narrower criminal justice approach to slavery, servitude and forced labour, as reflected in, for example, in the 1926 and 1956 slavery treaties.’<sup>459</sup>

Thus, we consider that the sociologically grounded expansionist understanding of slavery leaves us with a dilemma, as acknowledged by Bales (a sociologist who favours expansionism) & Allain (a legal scholar who adopts a restrictive approach). On the one hand, as Bales advocates, it provides us with the nearest approximation to the lived experience of a slave today and it serves well as a methodological tool supporting predictive validity in the social scientific study of slavery. On the other hand, as Allain

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<sup>453</sup> Datta, M., & Bales, K., ‘Slavery in Europe: Part 2, Testing a Predictive Model (2014) *Human Rights Quarterly* 36 (2), 277-295, p. 279-280; Bales & Robbins (2001), *supra* n. 226, p. 18.

<sup>454</sup> Nicholson (2010), *supra* n.124, p. 714. Gallagher (2009), *supra* n.140, pp. 800-801.

<sup>455</sup> McGeehan (2012), *supra* n. 172, p. 437.

<sup>456</sup> Balch (2013), *supra* n.342, p. 39.

<sup>457</sup> UN General Assembly, *supra* n. 219, p. 91

<sup>458</sup> For discussion of property paradigm and distinction between *de jure* and *de facto* ownership see Allain (2013), *supra* n.1, p.142; Allain & Bales (2012) *supra* n.254, p. 3.

<sup>459</sup> For more details on court’s assessment of the principles of responsibility in *LE v Greece* [2016] see Milano (2017), *supra* n.161, p. 726.

notes, it is not legally binding, thus the failure to engage with the legal definition has made it redundant as an anti-slavery tool within the rule of law.<sup>460</sup>

Taking the latter point into account, we believe that the need for accuracy when discussing the legal parameters of the forms of exploitation is of paramount importance, especially when such language can render terms ‘virtually meaningless’ leading to misguided efforts to adjudicate in law ultimately facilitating conceptual confusion and conflation.<sup>461</sup> The use of expansive language can also be problematic when it creates a situation in which exploitative or abusive behaviour fails to reach the legal threshold of the legally prohibited forms of exploitation.<sup>462</sup> Such an approach may enable a State to avoid responsibility by way of creative interpretation. For example, Nicholson suggests that a creative interpretation may leave the victim with little avenue for redress which, as David reminds us, is contrary to the tenets of criminal justice system that seeks to serve all.<sup>463</sup> Indeed, conflation can lead to dilution of the legal understanding of the prohibited practices, Chuang suggests that it can also inadvertently raise the legal threshold of human trafficking ‘by creating expectations of more extreme harms than required in law’, which is purposefully defined in such a way as to encompass a wide range of practices.<sup>464</sup> Chuang reinforces the position of Allain and Gallagher by making reference to the impact of any inconsistent interpretations of the human trafficking definition on international efforts to bring to justice those criminally responsible for violating the prohibition but also lead to a violation of the right of accused persons to be ‘informed promptly and in detail of the nature, cause and content of the charge [against them].’<sup>465</sup> Furthermore, we consider that it is also important to ensure that the legal developments thus far are given sufficient recognition. For example, the unilateral adoption and strict legal application of the 1926 slavery definition as a *jus cogens* norm emphasises the weight afforded to such an egregious form of exploitation.

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<sup>460</sup> Allain & Bales (2012) supra n.254, p. 6.

<sup>461</sup> Miers, S., *Slavery in the Twentieth Century: The Evolution of a Global Problem*, (Walnut Creek, Calif.: AltaMira. 2003), p.453; Allain (2008), supra n.209; Allain, J., ‘Book Review, Kevin Bales, *Understanding global slavery: a Reader*’, (2008) *International Journal of Refugee Law* 20 (1), 228-232; Gallagher (2009), supra n.140, pp. 799-848; Chuang (2014), supra n. 131; Chuang (2010), supra n.24, p. 1708; Nicholson (2010), supra n.124, p. 705; van der Wilt (2014), supra n.3, p. 297 Vijayarasa & Villarino (2012), supra n.58, p. 36.

<sup>462</sup> Nicholson (2010), supra n.124, p. 713.

<sup>463</sup> Nicholson (2010), supra n.124, p. 714; David (2015), supra n. 155, p. 151.

<sup>464</sup> Chuang (2010), supra n.24, p. 1709.

<sup>465</sup> Gallagher (2009), supra n.140, p. 799; Allain, J., ‘*The Definition of “Slavery” in General International Law and the Crime of Enslavement within the Rome Statute*,’ Guest Lecture Series of the Office of the Prosecutor, para. 1 (2007), available at [http://www.icc-cpi.int/NR/rdonlyres/069658BB-FDBD-4EDD-8414-543ECB1FA9DC/0/ICCOTP20070426Allain\\_en.pdf](http://www.icc-cpi.int/NR/rdonlyres/069658BB-FDBD-4EDD-8414-543ECB1FA9DC/0/ICCOTP20070426Allain_en.pdf), para. 1.

Whilst we take heed of the cautionary tone of scholars such as Allain, Chuang and Gallagher, we suggest that it is unwise to entirely dismiss the contribution of the expansionist discourse on the overall increasing uptake and recognition of labour exploitation. For instance, the international community is shining a spotlight and giving political attention to “modern slavery” in the UN Sustainable Development Goals and the ILO Global Estimates.<sup>466</sup> Therefore, whilst it is vital for academic scholarship to continue to critique and assess the impact of such expansionist discourse, it is important to find a meeting point; whereby the sociological approach becomes compatible with the legal reading.<sup>467</sup> The complexities of fully understanding the exact legal parameters of the prohibited forms of labour exploitation discussed in the first three chapters affirms that any articulation of the term “modern slavery” must be mindful of the difficulties in conceptualising the legal and social understanding of labour exploitation.<sup>468</sup>

Ultimately, a common reading and understanding of the different forms of labour exploitation is of vital importance to ensuring jurisprudential consistency so as to avoid ‘high level confusion’<sup>469</sup> and to provide guidance to domestic courts who have prohibited forms of labour exploitation in law, but due to an enforcement deficit have yet to further define or prosecute such criminal activities.<sup>470</sup> With this in mind, we once again stress, as does Allain, that clarification in law is the first step to overcoming conceptual ambiguity.<sup>471</sup> Achieving such clarity in law requires political will and momentum towards engendering a zero-tolerance approach to all forms of exploitation. However, the third obstacle reveals that political inertia has in fact contributed to a marginalisation of labour exploitation that can be attributed to evidence of a tolerance of exploitation.

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<sup>466</sup> See UN Sustainable Development Goals and ILO Global modern slavery estimate 2017.

<sup>467</sup> Allain & Bales (2012) *supra* n.254, p. 6-7.

<sup>468</sup> *Siliadin* [2005], *supra* n.129; *Rantsev* [2010], *supra* n.160; *C.N. and V.* [2012], *supra* n.208; *CN* [2013], *supra* n. 285; Stoyanova (2012), *supra* n.121, pp. 163-194.

<sup>469</sup> See for instance the differing position of ICTY in *Kunarac* and ECtHR in *Siliadin* and the outlining of the positions by McGeehan: *Gallagher v Hathaway*, *Allain v Bales*. McGeehan (2012), *supra* n. 172, p. 442.

<sup>470</sup> Allain (2013), *supra* n.1, p.142.

<sup>471</sup> Allain (2013), *supra* n.1, p.142; Allain (2009), *supra* n.138, p. 252.

#### 4. The marginalisation of labour exploitation: a political obstacle

Borrowing from McGeehan's doctoral work regarding the marginalisation of slavery in international law, we contend that the neo-abolitionist influence on the criminalisation of human trafficking for sexual exploitation and the proliferation of "modern slavery" has, in fact, compounded the marginalisation of labour exploitation. In this section we claim that the difficulty in clearly distinguishing between the different forms of severe labour exploitation has been further hampered by political inertia in tackling labour exploitation and the implicit tolerance of exploitation that emerges from structural issues that facilitate the continuation of exploitation.<sup>472</sup>

First, we turn to the lack of political engagement with tackling labour exploitation.

Policy measures addressing all forms of labour exploitation, including human trafficking, remain under-developed.<sup>473</sup> For example, despite the expansion of the international prohibition of human trafficking to include labour exploitation, it is a form of exploitation that has been excluded from key domestic policy documents aimed at combatting trafficking.<sup>474</sup> Furthermore, drawing on our examination of the dominance of human trafficking in obstacle one and the focus on tackling sexual exploitation in obstacle two, it is important to recognise that anti-trafficking provisions are selectively implemented. For Baer, this makes the anti-trafficking framework insufficient to address exploitation as it detracts attention and resources from less clear-cut or politically divisive cases of exploitation and abuse.<sup>475</sup>

We would pursue this line of reasoning and also emphasise Pope's assertion that the lack of detailed information on the application of human trafficking for labour exploitation also has implications on the amount of attention attributed to instances of labour exploitation with no human trafficking element at play.<sup>476</sup> The impact of

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<sup>472</sup> Andrees & van der Linden (2005), *supra* n.51, p. 69.

<sup>473</sup> Borg Jansson (2015), *supra* n.94, p. 97.

<sup>474</sup> Until 2008, Spain did not include labour exploitation in national action plan to combat human trafficking, see Waisman, V., 'Human trafficking: state obligations to protect victims' rights, the current framework and a new due diligence standard' (2010) *Hastings international and comparative law review* 33 (2), 385, at 396. For example, the existing Norwegian anti-trafficking framework is 'explicitly designed to address victimisation through sexual exploitation rather than through different forms of labour.' In Jahnsen & Skilbrei (2015), *supra* n.440, pp. 156-160.

<sup>475</sup> Baer (2015) *supra* n.415, p.167.

<sup>476</sup> Pope (2010), *supra* n.153, p. 1854.

marginalising labour exploitation has also been raised by Balch's research into forced labour, where it was found that less emphasis is placed on exploitative working practices involving deception or coercion.<sup>477</sup> Worryingly, such a situation can facilitate a sense of impunity, where acceptance and tolerance of poor working conditions, non-payment of wages and low labour standards become tolerated as the norm.<sup>478</sup>

As we begin to see the implications of a lack of political will, we turn to another issue that will impact upon the framing of exploitation in law: the tolerance of exploitation.

The tolerance of exploitation can be explained as a chicken and egg scenario. On one hand, the lack of prioritisation in relation to policy, resources and political will can lead to tolerance of exploitation. On the other hand, a tolerance of exploitation can be attributed to the lack of prioritisation. Taking the latter as a starting point, many scholars – including Mantouvalou and Lewis et al – stress that exploitation is not only facilitated by, but is a direct consequence of, structural inequalities that perpetuate the type of vulnerability that increases the risk of falling victim to exploitation.<sup>479</sup> Such systemic issues are to be found in the regulatory responses to migration, labour and criminal justice. For example, certain legally sanctioned migration measures in destination countries in fact create or compound the risk of exploitation, such as tied visa regimes that prohibit migrant workers from changing jobs without that employer's permission and often exclude workers from the protection of national labour laws and joining trade unions.<sup>480</sup>

The tolerance of exploitation by State actors has a ripple effect on the legal approach to tackling exploitation. For example, as we have seen in the first three chapters, international law places obligations on States to domestically criminalise labour exploitation. However, case-law analysis shows that States, in fact, often fail to implement existing legal frameworks. Therefore, it is unsurprising, that where even the most serious forms of exploitation remain unimplemented, that there is a significant

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<sup>477</sup> Balch (2013), *supra* n.342, p. 7.

<sup>478</sup> Edwards (2007-2008), *supra* n.9, p. 43. Balch (2013), *supra* n.342, p. 34.

<sup>479</sup> Mantouvalou (2018), *supra* n.436, p. 197; Lewis et al (2015), *supra* n. 299.

<sup>480</sup> See for example, discussion on migration policy and impact on exploitation in Gallagher (2015), *supra* n. 328, p. 62. See example of tied visa regime for domestic workers in Weatherburn & Muraskiewicz (2016), *supra* n.86.

lack of political consideration and regulation of types of exploitation that do not even meet the high legal threshold of slavery, servitude and forced or compulsory labour, but nevertheless are indicative of labour exploitation.<sup>481</sup> Pope has critiqued such lack of investment in tackling such marginal forms of exploitation (premised upon the less egregious consequences, such as failure to pay wages or violations of health and safety regulations), and argues that it is due to the fact that any engagement is ‘not vital to the power or prosperity of any important economic or political elite.’<sup>482</sup> Bearing in mind the consequences of political inertia and tolerance of exploitation that hamper any attempt at seeking legal clarification, two key points emerge.

First, findings from the IOM and EU Fundamental Rights Agency reveal that one consequence is the aggravation of non-engagement from the general public which, considering the complexity of the phenomenon, may have a sentiment that ‘it is beyond their control’.<sup>483</sup> Chuang laments the moral tolerance for exploitative labour conditions and lack of attention on States’ responsibility to promote safe labour conditions as it perpetuates the focus on other forms of human trafficking leading to increased vulnerability and acceptance of precarity as the norm.<sup>484</sup>

Secondly, another consequence of the lack of willingness to address labour exploitation is raised by Haynes who discusses the conditionality of legal protection which will only be afforded to those who are eligible (e.g. victims of trafficking) once they have proven their case and demonstrated their entitlement to such legal protection.<sup>485</sup> Such a position deliberately adopts the view that any improvement in their socio-economic position will not be facilitated by the State, unless they can prove on a case-by-case basis that they have suffered harm.

In order to overcome such marginalisation, the political inertia and tolerance of

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<sup>481</sup> See for example in the Netherlands, an example of good practice where the conceptual framework [begrippenkader] of labour exploitation recognises that there is a categorisation of situations that are more than labour law violations but not identified as labour exploitation under Article 273f. This has been conceptualised as “serious economic crime” whereby there are Serious disadvantage / serious violations. A form of social economic crime involving employers conscious and intentional law and regulations. This is about workers who are not exploited in the strict sense (in accordance with Article 273f) or of which this is considered not provable, but which you can make have underpayment, long working days, fines and (sexual) harassment, and as such “being severely disadvantaged”. Presentation of Luuk Esser, National Rapporteur’s Office: “slightest indication” at FNV Labour Exploitation Expert Meeting, 21 November 2017 and Inspectie SZW, Jaarverslag 2016, p.24.

<sup>482</sup> Pope (2010), supra n.153, p. 1854.

<sup>483</sup> IOM (2003), supra n. 103, p. 40. FRA (2015), supra n.45, p.53.

<sup>484</sup> Chuang (2006), supra n.358, p. 154.

<sup>485</sup> Haynes (2009), supra n.97, p. 4.

exploitation must be addressed. As Lewis et al propose, it is necessary to take into account situations of enforced vulnerability to exploitation by State-sanctioned denial of basic rights to employment, housing or welfare.<sup>486</sup> Such a shift in policy will minimise the impact of structural factors that make up the complex web of processes that render individuals vulnerable to exploitation. Here, such propositions place an emphasis on wider policy considerations, that thus far have been sidelined due to the ‘piecemeal and inconsistent’ response to exploitation that perpetuates a narrow, singular criminal justice focused response. As Lewis et al emphasise other labour and social security rights, so to does Haynes emphasise the implications for migrants and their socio-economic situation, whereby restrictive immigration policy is also a factor that, as Gallagher asserts, fails to consider debt-financed migration, neglect the obligation to ensure protection of labour and human rights and justify the securitisation of borders.<sup>487</sup>

By going beyond criminal law and emphasising the non-protection of labour and social security rights, it becomes inconceivable for future responses to combating labour exploitation to be premised solely upon criminal law, or indeed, law. Therefore, in order to overcome these obstacles, a legal conceptualisation alone will not suffice. Any shift in law and policy that seeks to better understand exploitative labour conditions will require a comprehensive response that acknowledges not only legal and the political economy but also moral and social economy, as we will discuss in the next section and in upcoming chapters that explore the moral wrong of exploitation in theory (Chapters 5 & 6).

## **5. Concluding remarks**

We saw in the first chapter that the lack of a definition of exploitation in the human trafficking definition is problematic, especially when the international definition is increasingly being recognised as a pivotal aspect to the anti-trafficking and modern-abolitionist movement. As was mentioned in the introduction of this chapter, we aim to adopt an approach that focuses upon exploitation whilst simultaneously building upon the successes of measures aimed at countering human trafficking.

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<sup>486</sup> Lewis et al (2015), *supra* n. 299, p. 2.

<sup>487</sup> Haynes (2009), *supra* n.97, p. 7. Gallagher (2015), *supra* n, 328, p. 57.



The presentation of the initial abstraction of the legal elements of exploitation in this chapter reinforce this assertion. Indeed, the similarity of the elements and how they are legally handled shows that there is potential for common ground. However, any quest for such legal clarification is hindered by the obstacles that have been discussed in this chapter.

These obstacles cannot be placed in a hierarchy of importance or, indeed, of causation as they are very much interrelated and the continuance of one can be fostered by another. As a result, the solution to these obstacles must be comprehensive. Law alone is not the answer. Thus, whilst this thesis suggests that a legal conceptualisation of labour exploitation can go some way towards overcoming some of the obstacles, it must not work in isolation, if it is to be effectively applied. As Ollus writes, any approach which seeks to clarify the legal meaning of (labour) exploitation should ‘see trafficking for the purpose of forced labour as both a crime and labour concern and to engage both law enforcement as well as labour actors (such as labour inspectors and trade unions) in the fight against (labour) trafficking.’<sup>488</sup> Furthermore, a shift to a focus on exploitation will lead to a holistic human rights based approach that will be universal in application to all those who are vulnerable to exploitation.<sup>489</sup>

We will see in subsequent Chapters, that a shift towards exploitation is, on the one hand, a viable option, as it ‘gives us a lot of room for systemic change.’<sup>490</sup> However, on the other hand, the embryonic stages of this shift reveals the complexity of the phenomenon. This requires a bespoke mindful approach that overcomes stereotypes and perceptions by taking into account all of the individuals involved regardless of gender and migration status.

Indeed, striving for a universal approach is not necessarily the most appropriate way of dealing with such a complex phenomenon, and in this regard, we support Piper et al’s suggestion that ‘the intention of engaging directly with definitional understandings is not to resolve what will be the ultimate universal language and

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<sup>488</sup> Ollus (2015) *supra*, n.7, p. 238.

<sup>489</sup> Coghlan & Wylie (2011) *supra* 103, p. 1522.

<sup>490</sup> Piper, N., Segrave, M., & Napier-Moore, R., ‘Editorial: What’s in a Name? Distinguishing forced labour, trafficking and slavery’, (2015) *Anti-Trafficking Review*, issue 5, 1–9, p. 8.

meaning, rather to recognise and articulate both complexity and contradiction. There will never be one approach or understanding that is utilised internationally or locally. We must find a way to embrace the diversity of interpretations and understandings.<sup>491</sup> Such ‘diversity’ requires ‘individual strategies operating on multiple levels’<sup>492</sup> that ensures a context specific approach.

Finally, the proliferation of terms such as “modern slavery” suggests that the international community is committed to combatting the phenomenon. However, the reality is that the use of the non-legal term “modern slavery” in fact does not assist with the real task at hand, that is to determine ‘where, on a continuum and in different contexts, “appropriate” exploitation ends and “inappropriate” exploitation begins.’<sup>493</sup> The lack of engagement by States to address this situation means that it is both politically and legally hanging in the balance.<sup>494</sup>

The legal conceptualisation of exploitation will begin to address this conundrum. However, in order to achieve this, a further exploration of the theoretical understanding of the constituent elements of exploitation will be undertaken in the following chapters. The findings of the theoretical analysis in the next Part and the legal analysis in this Part will then be used as an analytical tool for discerning the judiciary’s understanding of the material scope of exploitation in two national legal orders.

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<sup>491</sup> Piper, et al (2015), *supra* n.491, p. 8.

<sup>492</sup> Quirk (2006), *supra* n. 450, p. 596.

<sup>493</sup> O’Connell Davidson (2010), *supra* n.58, p. 257.

<sup>494</sup> Gallagher (2008), *supra* n. 55.

## **PART II –Exploitation and its main elements in political theory**



## CHAPTER 5 – An exploration of exploitation in political theory

### 0. Introduction and structure of the chapter

The concept of exploitation remains undefined in law. However, as we have seen in Part I, some standalone forms of labour exploitation are defined in law (e.g. slavery, servitude and forced or compulsory labour). In this thesis we emphasise the need for further exploration of the concept of exploitation and in particular the conditions that govern its application in law. In addressing this need, we use Hill's normative stance and primary motivation of his exploration of the legal applicability of exploitation theory:

*No clearly defined necessary and sufficient conditions govern the application of the concept of exploitation. Nor is there an adequate theoretical basis for understanding exploitation or its exculpatory function in the law.*<sup>1</sup>

The purpose of our exploration in theory is to seek to resolve this conceptual gap in law. We propose an exploration of the tenets of exploitation theory as a way to improve our understanding of the material scope of labour exploitation in law and the impact of the law on certain groups who are at risk of exploitation. Indeed, in addition

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<sup>1</sup> Hill, J., 'Exploitation', (1994) *Cornell Law Review* 79, 631, p. 635.

to Hill, legal scholars such as Allain and Rijken have already begun this exploration,<sup>2</sup> and we use this literature as the starting point for further development of the analytical framework that is applied to the comparative analysis of national criminal case law in Part III.

With this chapter we answer the following subsidiary research question: *How do exploitation theories conceptualise labour exploitation?*

Our exploration of exploitation theory in Part II is twofold. In Chapter 5, we present a typology of exploitation theories that will then be operationalised as part of our identification of the key constituent conditions of exploitation in Chapter 6. These conditions, together with the findings from the legal analysis in Part I, will constitute the normative basis of an ‘assessment tool’ that, as Sample posits, can be used to ascertain whether or not certain situations amount to exploitation.<sup>3</sup> We recognise the difficulties of such an endeavour, particularly due to the normative value and differing moral standards of exploitation. Indeed, as Wolff notes, any conceptual clarification may well not result in a clearly articulated ‘technical definition’ of exploitation.<sup>4</sup> He writes:

*My argument is that while it is relatively straightforward to identify the elements that are relevant to a charge of exploitation, it is very unlikely that there will be any clear formula that can be applied in every case, or would be acceptable to people who make different moral assumptions about the same case.*<sup>5</sup>

Yet, we consider that despite these challenges, the identification of the conditions of exploitation can go a long way to ensuring a consistent understanding and application of the concept of exploitation in law.

Generally, in ordinary parlance, ‘to exploit something is to use or take

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<sup>2</sup> Allain, J., *Slavery in international law of human exploitation and trafficking*, (Leiden: Martinus Nijhoff Publishers, 2013); Rijken, C., ‘Legal Approaches to Combating the Exploitation of Third-Country National Seasonal Workers’, (2015) *International Journal of Comparative Labour Law and Industrial Relations*, 31(4), 431–451.

<sup>3</sup> Sample, R., *Exploitation: What it is and why it’s wrong*, (New York: Rowman and Littlefield Publishers, 2003), p. 2.

<sup>4</sup> Wolff, J., ‘Structures of exploitation’ in Collins, H., Lester, G., & Mantouvalou V., (eds) *Philosophical Foundations of Labour Law*, (Oxford University Press, 2018).p. 187.

<sup>5</sup> Wolff (2018), *supra* n.4, p. 176.

advantage of that thing.’<sup>6</sup> Exploitation is a concept that can be either morally neutral and positive or moralised and negative. We focus upon the exploitation of persons as a moralised and negative practice.<sup>7</sup> To this end, in this chapter we seek to identify the point at which the use of a person becomes illegitimate or wrong. Interestingly, political theories of exploitation reveal a contested understanding when establishing the threshold of wrongful exploitation<sup>8</sup> and admittedly not all morally reprehensible conducts are subject to legal intervention.<sup>9</sup> Yet, a determination of the threshold of exploitation as a morally wrong concept can be of utility when considering the extent to which such conduct should be regulated by law and criminal law in particular.

Exploitation in political theory is an area of scholarship where the discourse is well developed with clear divisions between the different approaches explored and critiqued. As such, we cannot claim expertise to confront such nuances. Similarly, it is not the purpose of the present thesis to outline every theory of exploitation, but rather to determine the critical aspects that are of relevance to the object of enquiry of the thesis; a conceptualisation of exploitation that seeks to enhance the legal understanding of labour exploitation in human trafficking and as a standalone offence.

Whilst we will see that much of the theoretical debate is grounded in Marx, the modern understanding of exploitation theory has extended the meaning of the concept beyond the extraction of surplus value.<sup>10</sup> A shift that this thesis supports. The Marxist critique of capitalism has been reconstructed and reconceptualised in order to capture a wider understanding of exploitation that is not just limited to ‘relations of economic exchange’<sup>11</sup> (structural) but also to consideration of issues of fairness and distributive justice to non-market, interpersonal exchanges (relational).<sup>12</sup> As Zwolinski summarises:

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<sup>6</sup> Holmstrom, N., *Exploitation in The International Encyclopedia of Ethics*, (Blackwell Publishing, 2013); McLean, I., & McMillan, A., *The Concise Oxford Dictionary of Politics*, (3 ed.), (Oxford: Oxford University Press, 2009).

<sup>7</sup> See distinction between exploitation of a thing (s-exploitation) and exploitation of persons (p-exploitation) in Mayer, R., ‘A Walzerian Theory of Exploitation’ (2002), *Polity* 34(3), 337-354, pp. 337-354, p. 339.

<sup>8</sup> Mayer (2002), *supra* n.7, p. 338-339.

<sup>9</sup> Duff, R.A., Farmer, L., Marshall, S.E., Renzo, M. & Tadros, V. (eds) *Criminalisation: the political morality of the criminal law*, (Oxford University Press, 2015), p. 8-9.

<sup>10</sup> Brewer, J., ‘The Scottish Enlightenment’, in Reeve, S., (ed) *Modern Theories of exploitation* (Sage Publishing, 1987), p. 12; Fleurbaey, M., ‘The facets of exploitation’, (2014) *Journal of Theoretical Politics* 26(4), 653–676, p. 654-655.

<sup>11</sup> Wolff, J., ‘Marx and Exploitation’, (1999) *The Journal of Ethics* 1(3), 105–120, p. 105. See also Verma V., ‘Exploitation and Justice: Should We Be Interested in a Theory of Exploitation?’, (Jan. 17-23, 1998) *Economic and Political Weekly* 33(3), 115-121, p. 116.

<sup>12</sup> Zwolinski, M., ‘Structural Exploitation’, (2011) *Social Philosophy and Policy* 29(1), 154-179, p.159.

*Understanding exploitation in terms of unfair or degrading use rather than in terms of the forced extraction of surplus labour allows us to apply the idea of exploitation in contexts other than the economic relationships on which Marx focused, such as relationships between intimates.*<sup>13</sup>

The findings in this chapter do not adhere to one particular school of thought, but instead develop a comprehensive understanding of exploitation. This is exemplified by the fact that the analysis goes beyond economic inequality and also considers social and educational class and non-class differences, as a function of one's emotional or psychological state.<sup>14</sup> The application of such an understanding is crucial to the understanding of exploitation in law, as the root causes or background conditions are multiple, including not just economic, but also social, political and psychological elements can play a significant role in the circumstances that lead to the actual exploitation. In essence, by turning to presentations of exploitation in political theory, we seek to determine the normative content of exploitation, as understood in existing theories, and begin to determine how such an understanding can assist in the conceptualisation of labour exploitation in the legal context of human trafficking.

In this chapter we will first introduce the findings of the exploratory analysis and the three models of exploitation that we have developed and presented as a typology of exploitation (Section 1). This typology acknowledges both the structural and relational constructions of exploitation and, as such, in the second part of this chapter we consider how such a typology can be applied to a contemporary understanding of labour exploitation (Section 2).

## **1. A typology of exploitation theory: structural and relational constructions of exploitation**

As mentioned in the introduction of this chapter, this Part of the thesis ultimately seeks to determine the theoretical conditions of both structural and relational exploitation that

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<sup>13</sup> Zwolinski (2011), *supra* n.12, p159.

<sup>14</sup> Non-class forms of exploitation are groups identified according to gender, race, nationality, disability, age, sexuality etc and not as in the Marxist rhetoric, workers who were considered as class that was exploited. Non-class identity groups considered to be oppressed rather than exploited, however since a woman can be both oppressed and exploited, the distinction cannot necessarily stand in context of labour exploitation. Supported by Hill (1994), *supra* n.1, p. 634; Rijken also agrees with this reading of exploitation, the impact of the exploitation on the ability to rationally decide, in Rijken (2015), *supra* n.2. See also Veneziani, R., 'Exploitation, inequality and power' (2013) *Journal of Theoretical Politics* 25(4) 526–545, p.545.



can be applied to a clear and consistent legal understanding. Namely exploitation by individuals on other individuals (relational) and the societal structures that foster exploitation by failing to minimise the risk of exploitation (structural). Such a task is, however, complex due to the starting point being one whereby, as Veneziani highlights, ‘there is little agreement concerning even the most basic features of exploitative relations, and both the definition of exploitation and its normative content are highly controversial.’<sup>15</sup> Mayer also reflects upon the variety of understandings of exploitation that demonstrate that ‘even where there is agreement that a given act of exploitation is wrong, there is disagreement about why it is wrong.’<sup>16</sup> For instance, many exploitation theorists acknowledge other extrapolations of the concept and simply acquiesce to the different interpretations by agreeing to disagree.<sup>17</sup> With this challenge in mind, following an explorative literature review of exploitation in political theory, we have developed a typology of three theoretical models of exploitation:

First is the **Redistribution Model**, wherein we focus upon the structural representation of exploitation fostered by societal structures that impact on individuals as a result of unfair distribution of assets and resources.

Second is the **Human Dignity Model**, wherein we focus upon the relational representation of exploitation inflicted by individuals on other individuals wherein the result of the exploitation is denoted as degradation that results from a lack of respect for the dignity of others who are in a position of a vulnerability or weakness.

Third is the **Basic Needs Model** wherein the exploitation theories we present refer to both structural and relational interactions. This “middle-ground” establishes a basic needs threshold from which the fairness of transactions can be assessed.

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<sup>15</sup> Veneziani (2013) *supra* n.14, p.527.

<sup>16</sup> Mayer, R., ‘What’s Wrong with Exploitation?’, (2007) *Journal of Applied Philosophy* 24, 137-150, p. 137

<sup>17</sup> The debate is still ongoing amongst political theorists and philosophers, see for example the recent dialogue between Vrousalis and Arneson Vrousalis, N., ‘Exploitation, Vulnerability, and Social Domination’ (2013) *Philosophy and Public Affairs* 41(2), 131–157; Arneson, R.J., ‘Exploitation, Domination, Competitive Markets, and Unfair Division’, *Southern Journal of Philosophy* (2016), 54 (S1), 9-30; Vrousalis, N., ‘Exploitation as Domination: A Response to Arneson’ (2016) *Southern Journal of Philosophy* 54 (4), 527-538. See Wood on Wertheimer’s approach to the use of the term of exploitation as a reference to transactions whose terms are unjust or unfair, Wood, A., ‘Unjust exploitation’, (2016) *The Southern Journal of Philosophy* 54, 92–108, p. 9; See Wertheimer on understanding of exploitation that requires harm, that recognises that there can be a benefit to the exploited party, that it is possible to consent to exploitation, Wertheimer, A., ‘Remarks on Coercion and Exploitation’, (1996-1997) *Denver University Law Review* 74, 889, p.897.

### 1.1. The Redistribution Model

The first theoretical conception of exploitation is labelled as the **Redistribution Model** wherein the theoretical understanding of exploitation is market-driven adopting an impersonal and non-relational stance. The theories encapsulated by the Redistribution Model critique the composition of societal structures, namely capitalism as an ‘institution for labour exchange,’<sup>18</sup> and their impact on the commodification of labour, such as an unequal exchange that departs from a hypothetical competitive market prices in trade.<sup>19</sup> From a Marxist perspective, capitalist systems lead to the commodification, not just of the products but also of the workers who produce the products.<sup>20</sup> Herein, there is an extraction of profit derived from the surplus value of the workers’ labour power.

Despite being premised upon a structural construction - that is a technical and amoral concept that focuses upon the aforementioned unequal exchange between the capitalist owners of the means of production and the workers<sup>21</sup> - some Marxist commentators, including van der Veen, have suggested that it is not possible to maintain a ‘non-ethical concept of exploitation, while at the same time morally condemn[ing] capitalism as an inherently exploitative economic system.’<sup>22</sup> Contrary to this reading, Carver emphasises that the conditions of a capitalist, market driven, society does renders exploitation a morally charged phenomenon.<sup>23</sup> Indeed, such a position is shared by liberal egalitarian political theorists, such as Roemer, who adopt a moralised account of exploitation with the crucial object of enquiry being the background issues which renders the asset distribution unjust (and as a result exploitative) rather than determining the rate of exploitation (or the unequal exchange) according to the surplus value.

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<sup>18</sup> Roemer, J. ‘Origins of Exploitation and Class: Value Theory of Pre-Capitalist Economy’, (1982) *Econometrica* 50(1) 163-192, p.164.

<sup>19</sup> Fleurbaey (2014), *supra* n.10, p. 655.

<sup>20</sup> Carver, T., ‘Marx’s political theory of exploitation’, in Reeve, S., (ed) *Modern Theories of exploitation* (Sage Publishing, 1987), p.69.

<sup>21</sup> Cohen, G.A., ‘The Labor Theory of Value and the Concept of Exploitation’, (Summer, 1979) *Philosophy & Public Affairs* 8(4), 338-360, p. 341.

<sup>22</sup> van der Veen, R. J., ‘Can socialism be non-exploitative?’, Reeve, S., (ed) *Modern Theories of exploitation* (Sage Publishing, 1987), p.80

<sup>23</sup> Carver (1987), *supra* n.20, p.81; Veneziani (2013) *supra* n.14, p.528.

A common denominator that emerges in the Redistribution Model is the ownership and property relationship of key assets that are the object of value in the process of commodification.<sup>24</sup> For instance, the Marxist labour theory of value is premised upon an individual's ownership or control of that which creates value. Exploitation in this context therefore occurs when there is 'the wrongful denial to the labourer [...] to the full capital [or value] of his labour' without a valid claim.<sup>25</sup> When discussing the Marxist theory of value Carver writes:

*[...] only workers [can] contribute the labour that transforms materials into goods. Ownership or control of the instruments of production, natural resources or the means to purchase them does not constitute work [...] If some of the product is possessed, used, [or] controlled, by certain persons because they own the means of exploitation, there is exploitation.*<sup>26</sup>

Conversely, the emphasis on the consequences of the exploitation by way of unequal endowments of assets is contested by liberal egalitarian theorists such as Roemer.<sup>27</sup> They reject the Marxist understanding of exploitation as the transfer of surplus value as, for Roemer, it does not effectively reflect the 'inequality in the ownership of the means of production' and 'hence exploitation (the transfer of surplus value) is not a proper reflection of underlying property relations.'<sup>28</sup> Instead, in Roemer's general theory of exploitation, the emphasis is placed on property relations between the parties involved with regards to the *initial* ownership of the means of production.<sup>29</sup> By focusing on the initial ownership of the means of production rather than the ownership of the labour power, Goodin seeks to highlight 'any discrepancy or shift between the creation of a product through labour and the value according to the

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<sup>24</sup> For more discussion on the labour entitlement theory of property see Reeve, S., Hodgskin, T., & Bray, J., 'Free exchange and equal exchange', in Reeve, S., (ed.) *Modern Theories of exploitation* (Sage Publishing, 1987), p. 32.

<sup>25</sup> Reeve et al (1987), supra n.24, p. 41.

<sup>26</sup> Carver (1987), supra n.20, p.69

<sup>27</sup> Roemer's approach is supported by Fleurbaey (2014), supra n.10, p. 653.

<sup>28</sup> Roemer, J., 'Exploitation and Labour Theory of Value,' (1986) *Economic & Political Weekly*, 21(3) pp. 138-140, p.139; John Roemer, Should Marxists be Interested in Exploitation? *Philosophy & Public Affairs*, Vol. 14, No. 1 (Winter, 1985), pp. 30-65, p. 32-33

<sup>29</sup> For more on Roemer's general theory of exploitation see Roemer, J., 'Exploitation and Labour Theory of Value,' (Jan. 18, 1986) *Economic and Political Weekly* 21(3), 138-140, p.281. Roemer, J., 'Property Relations vs. Surplus Value in Marxian Exploitation', (Autumn, 1982) *Philosophy & Public Affairs* 11(4), 281-313p. 302-303.

See *a contrario* in Godels, G., 'The Birth and Death of Exploitation Theory: Can the Idea of Exploitation Be Saved from John Roemer's Critique?' (1998) *Nature, Society, and Thought* 11(4), 448, p. 448

desirability of the commodification does not impact on the identification of economic exploitation.’<sup>30</sup>

In order to distinguish between commodification and exploitation, it is important to consider the impact of unequal ownership. The theories encapsulated under the Redistribution Model place an emphasis on distributive injustice. Critically, whilst much of the exploitation debate is still grounded in the work of Marx, it must be recognised that the meaning has been extended beyond the extraction of surplus<sup>31</sup> towards consideration of what Roemer articulates as ‘the distributional consequences of an unjust inequality in the distribution of productive assets and resources.’<sup>32</sup> Consequently, it is important to recognise that subsequent distributive injustices are derived from different sources.

On one hand, the injustice is positioned as an inequality in the ownership of the means of production and discusses unfair endowments or assets. The surplus value is calculated in accordance with a rate of exploitation that determines the capital paid out as wages that should be equal to the value of the worker’s labour power: variable capital. Surplus value is the value produced by the worker that is over and above that represented by the variable. The ratio of surplus value to variable capital is called the rate of exploitation.<sup>33</sup>

On the other hand, whilst the unequal exchange of the Marxist tradition is acknowledged, there is instead a consideration of the unfair advantage that results from the exploitative transaction and the moral weight that should be attributed to such an outcome. Here, shifting away from Marxist understanding, the fairness of the transaction is the focus and does not take into account the background conditions from which unfairness may arise.<sup>34</sup>

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<sup>30</sup> Goodin, R., ‘Exploiting a situation and exploiting a person’, Reeve, S., (ed.) *Modern Theories of exploitation* (Sage Publishing, 1987), p. 166.

<sup>31</sup> Brewer (1987), supra n.10, p. 12.

<sup>32</sup> Roemer, J., ‘Should Marxists be Interested in Exploitation?’, (Winter, 1985) *Philosophy & Public Affairs* 14(1), 30-65, p. 65

<sup>33</sup> For detailed explanation of the Marxist labour theory of value see Cohen (1979), supra n.21, p. 341.

<sup>34</sup> Mantouvalou V., ‘Legal construction of structures of exploitation’ in Collins, H., Lester, G., & Mantouvalou V., (eds) *Philosophical Foundations of Labour Law*, (Oxford University Press, 2018), p. 193.

Finally, the elimination of exploitation is considered in the Redistribution Model by using different means of assessing the anti-thesis of exploitation. For Marxists, exploitation is an inherent feature of capitalist society and cannot be eliminated. However, it is possible to reduce the rate of exploitation by eliminating the dominant ownership of the means of production. As Carver explains:

*The crucial element of Marxist's understanding of exploitation within capitalist society, is that exploitation is a defining feature. Thus, rather than eliminating the phenomenon, the rate of exploitation may be measured. In order to achieve an exploitation rate of zero, Marxists believe in the distribution of the means of ownership in society permitting the control of the means of production to be shared equally by society as a whole.*<sup>35</sup>

For Marx, the rate of exploitation can be minimised by adopting a socialist ownership approach where, 'class distinctions and privileges will disappear altogether with the economical basis from which they originate; and society will be transformed into an association of producers.'<sup>36</sup> Such equal access to the means of production would require the redistribution of property entitlements placing the emphasis on equal property ownership; replicating a communist societal order. The inevitability of exploitation as purported in the Marxist discourse is challenged by liberal egalitarian theorists who believe the emphasis on the ownership of means of production will remove the necessity to provide labour in a capitalist, subsistence, economy as workers are able to relinquish their labour power; therefore the inevitability of exploitation is eliminated.<sup>37</sup>

## 1.2. The Human Dignity Model

The **Human Dignity Model** is representative of those exploitation theories that have co-opted the notion of human dignity as a normative baseline. Here, the emphasis is placed on any action that devalues human dignity as a result of the exploiter's choice

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<sup>35</sup> Carver (1987), *supra* n.20, p.71 & p. 47.

<sup>36</sup> Marx, K., 'Nationalisation of Land,' (1952) *Labour Monthly* 34, 415-17, p. 417 cited in Steiner, H., 'A Liberal Theory of Exploitation', (1984) *Ethics* 94 (2), 225-241, p. 241.

<sup>37</sup> See Reiman, J., 'Exploitation, Force, and the Moral Assessment of Capitalism: Thoughts on Roemer and Cohen', (Winter, 1987) *Philosophy & Public Affairs* 16(1), 3-41, p. 30.

to seek financial gain or personal profit over and above the dignity of the person being exploited. These theories relate exploitation to situations that have profited from either the vulnerable characteristics or background conditions of the individuals such as poverty or economic vulnerability; or the degrading or humiliating circumstances surrounding the individual based upon a lack of respect afforded to them, either by society as a whole or by certain individuals who are in a relationship of power.

Contrary to the first model, this understanding of exploitation is inherently morally based. In some instances, the underlying rationale for the emphasis on human dignity is to identify the moral wrong or “badness” of exploitation - an issue that, according to Sample, has not been sufficiently addressed by scholars<sup>38</sup> - in order to reach an understanding of the concept that permits its use as “a tool of moral criticism.”<sup>39</sup>

The Human Dignity Model emphasises the personal, relational aspects of the exploited party, by taking into account the background conditions of the individual.<sup>40</sup> Such background conditions can be premised upon vulnerabilities that have already been raised in literature such as dependencies created by existing social conditions (Goodin), indebtedness (O’Connell-Davidson),<sup>41</sup> lack of a reasonable alternative (Valdman & Liberto), inability to provide for oneself (Goodin),<sup>42</sup> psychological or cognitive weakness (Hill),<sup>43</sup> a threat of harm (Goodin),<sup>44</sup> or as a result of force of circumstances beyond the control of the individual (as we will see in Chapter 9). Hill argues that the vulnerability is a defect that will impact upon the quality of the transaction predominantly by reinforcing the inequality and imbalance of bargaining power between the two parties.<sup>45</sup> For Sample, a position of unequal bargaining power leads to ‘the person who has the greater power in the relationship [using] is to gain the

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<sup>38</sup> See Sample’s critique of Feinberg failure to account of the badness of exploitation can be given “in the absence of a complete normative moral theory” and opts instead for a description of the conditions under which we are more or less likely to make exploitation, Wertheimer’s account is inadequate because it fails to account for the badness of exploitation, and the Marxian understanding of exploitation, Sample considers this is to be merely “a technical notion” devoid of any moral content. Sample (2003), *supra* n.3, p. 2-4, p. 6-7, p. 56 & p. 65.

<sup>39</sup> Sample (2003), *supra* n.3, p. 3

<sup>40</sup> Sample (2003), *supra* n.3, p. 82.

<sup>41</sup> O’Connell Davidson, J., ‘Troubling freedom: migration, debt, and modern slavery’, (2013) *Migration Studies* 1(2): 176-195, p. 195; Goodin, R., *Protecting the vulnerable: a reanalysis of our social responsibilities*, (Chicago: University of Chicago Press, 1985), p. 191 & p. 192.

<sup>42</sup> Valdman, M., ‘A Theory of Wrongful Exploitation,’ (2009) *Philosophers’ imprint* 9(6), p. 1; Liberto, H., ‘Exploitation and the Vulnerability Clause,’ (2014) *Ethic Theory Moral Prac* 17, 619–629, pp. 621-622. Goodin (1985), *supra* n.41, p. 54.

<sup>43</sup> Hill (1994), *supra* n.1, p. 683-684.

<sup>44</sup> Goodin (1985), *supra* n.41., p. 110.

<sup>45</sup> Hill (1994), *supra* n.1, p. 683-684.

advantage in a way that fails to respect the other person in the relationship.’<sup>46</sup> Such a situation can arise even in circumstances where the agreement or exchange is mutually advantageous.

Having regard to the background conditions (including vulnerabilities) that can contribute to a defective exchange, there is a need to consider at what point such an exchange amounts to exploitation. For Wertheimer, a harmful outcome is the key distinguishing feature. Harmful exploitation occurs when A intentionally gains by an action or transaction that is harmful to B. Harm occurs where a person’s physical, psychological, socio-economic, position is worse off as a result of their interaction with another. The harm element leads to a distinction between a transaction where A gains over B, and an exploitative transaction where A gains by causing harm to B. Where harm is the result of the transaction, then the transaction is unfair and thus amounts to exploitation.<sup>47</sup> Goodin frames the antithesis to harmful exploitation as a duty to refrain from harm, which emphasises the moral imperative to protect the vulnerable:

- 1. All persons have a moral duty to protect the vulnerable;*
- 2. If a person has a duty to protect the vulnerable, then that person has a duty to refrain from exploiting the vulnerable;*
- 3. If a person has a duty to protect the vulnerable, then that person has a duty to create and support institutions that prevent others from exploiting the vulnerable;*
- 4. All persons have a duty to refrain from exploiting the vulnerable;*
- 5. All persons have a duty to create institutions that protect the vulnerable from exploitation.*<sup>48</sup>

The protection of the vulnerable by way of a duty to refrain from harm is not only morally charged but also consequentialist. Where the infliction of harm results from a high dependency upon an individual, then Goodin argues that the exchange must be framed ‘in such a way as to produce certain sorts of consequences, namely, ones that protect the interests of those who are particularly vulnerable to your actions and choices.’<sup>49</sup> Indeed, Goodin’s understanding emphasises the notion of exploitation as a

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<sup>46</sup> Sample (2003), supra n.3, p. 83-84 & p.87-88.

<sup>47</sup> Wertheimer, A., *Exploitation*, (Princeton University Press, 1996), p. 209.

<sup>48</sup> Sample (2003), supra n.3, p. 38; see also Goodin (1985), supra n.41, p.109-110.

<sup>49</sup> Goodin (1985), supra n.41, p. 114.

process and not just an outcome.<sup>50</sup> Already the understanding of exploitation from the perspective of vulnerability deviates from the Marxist analysis. Instead it aligns with the broader understanding of liberal egalitarian political theorists who conceive of exploitation as a process, considering not only the economic discrepancies at the end of the process but also the impact of interpersonal features throughout the process, including the background conditions of the individuals in question.<sup>51</sup> Arguably, the Human Dignity Model goes one step further by also recognising the possibility, not just for *ex ante* vulnerabilities, but of the creation of *ex post* vulnerabilities as a consequence of the infliction of harm which could impact upon either their welfare, psychological and physical sensitivities and absolute interests: such as food, clothing and shelter.

As we discussed above, Sample also emphasises that an affront to human dignity is the normative basis for any understanding of exploitation, proposing a more “morally thick” formulation of exploitation as degradation.<sup>52</sup> For Sample, the wrongful characteristic of an exploitative relationship is degradation:

*Relationships can be voluntary, non-coerced, and even mutually beneficial, and yet may be subject to the moral criticism that they are exploitative. The badness stems from the degradation of one or more of the agents in a transaction for advantage. Degradation is, on my view, treating someone or something as having less value than that person or thing actually has.*

The inherent element of exploitation as degradation is a lack of respect for the value of other human beings; for Sample, respect is a way of responding to the value of persons.<sup>53</sup>

*Exploitation occurs when the value of persons is not appropriately respected. This can happen when their human capabilities are ignored in the course of an interaction or relationship of mutual benefit; or when we take advantage of injustice to profit from that interaction or relationship; if when we inappropriately commodify something. Exploitation can occur at either level of individual transaction, or at the level of*

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<sup>50</sup> Goodin (1987), *supra* n.30, p. 181.

<sup>51</sup> Goodin (1987), *supra* n.30, p. 181

<sup>52</sup> For Sample, one crucial element of the understanding of exploitation as degradation is that it not only reflects the ordinary meaning of exploitation as it is objectivist and pluralistic, it may also be applied to both impersonal and personal exploitation: which thus far has not been the focus of exploitation theorists. Sample (2003), *supra* n.3, p. 2-4, 6-7, 56 & 65.

<sup>53</sup> Sample (2003), *supra* n.3, p. 65



*protracted relationship. When exploitative interactions fail to properly value our interactors, degradation has occurred.*<sup>54</sup>

This approach follows the Kantian view that ‘human beings are “ends in themselves” and that respect of the moral law requires that we treat them as such. Every person possesses “dignity”, which differentiates us from those things and creatures that possess merely “price”.’<sup>55</sup> Accordingly, an exploitative interaction with an individual demonstrates a lack of respect in the following ways:

- 1. Failure to respect a person by neglecting what is necessary for that person’s well-being to flourish;*
- 2. Failure to respect a person by taking advantage of an injustice done to him;*
- 3. Failure to respect a person by commodifying or treating as a fungible object of market exchange, an aspect of that’s persons being that ought to not be commodified.*<sup>56</sup>

Both Goodin and Sample suggest that non-exploitation can be achieved by imposing moral duties and obligations on society and individuals: namely, a duty to protect the vulnerable and a duty to respect others. Sample proposes that the application of a duty to respect others would ensure that exploitation does not occur. Such a duty requires awareness and restraint in order to preserve the value and dignity of others by not treating them as a means to an end. The focus on vulnerability here, as with the discussion in the legal analysis, shows that vulnerability is a key component of the understanding of exploitation. Thus a non-exploitative situation would mean that the value of others has been upheld through adequate respect during the course of a transaction.<sup>57</sup> Goodin’s duty to protect the vulnerable goes one step further by seeking to achieve a state of *invulnerability*, wherein the need for society to offer special protection (by way of a duty to protect the vulnerable) would be removed.<sup>58</sup> Since vulnerability is a significant risk factor, seeking to achieve its reduction or elimination would reduce the opportunities people have to exploit one another as they will be regarded as equals and have more equal bargaining power.<sup>59</sup> Non-exploitation could be

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<sup>54</sup> Sample (2003), supra n.3, p. 83

<sup>55</sup> Immanuel Kant, *Foundations of the Metaphysics of Morals*, trans. with an introduction by Lewis White Beck (Indianapolis: Bobbs-Merrill, 1969, 47, 53 cited in Sample (2003), supra n.3, p. 62

<sup>56</sup> Sample (2003), supra n.3, p. 57

<sup>57</sup> Sample (2003), supra n.3, p. 67, p. 14 & p. 72.

<sup>58</sup> Goodin (1985), supra n.41, p. 190.

<sup>59</sup> Goodin (1985), supra n.41, p. 195.

achieved by increasing interdependency and mutuality that amounts to equal dependency and despite the continued existence of some kind of “power relation”, any dependencies or vulnerabilities would be reciprocal.<sup>60</sup> However, in light of the recognition of the socially contrived nature of vulnerabilities and dependencies, that are ‘created, shaped, or sustained, at least in part, by existing social arrangements,’<sup>61</sup> the possibility of a situation of complete invulnerability is unlikely, as there will always be some natural and unavoidable vulnerabilities.<sup>62</sup>

Whilst an understanding of non-exploitation through the Human Dignity Model, as presented in this section is a morally thick standard to which all should strive, the situation is very often so complex that competing interests mean that it is not always possible to ensure respect for the person.<sup>63</sup> Therefore, it may well be too onerous to effectively fulfil such an obligation (either collectively or individually). Nevertheless, it is possible to mitigate the impact of our actions (again either collectively or individually) by recognising those who are exploitable and by complying with our moral obligations and duties to respect others and to protect the vulnerable. However, where the complexity of the situation makes non-exploitation difficult, the final theoretical model offers a middle ground between redistribution of inequalities on the one hand and a recognition of the inherent nature of human dignity on the other hand.

### 1.3. The Basic Needs Model

The final model of exploitation - the **Basic Needs Model** – is derived from sufficientarian theories by focusing upon the notion of unfairness in order to determine a benchmark whereby it is possible to establish the threshold at which a situation is deemed exploitative.<sup>64</sup> Two relevant explanations have been proffered in literature. The

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<sup>60</sup> Goodin (1985), supra n.41, p. 196.

<sup>61</sup> Goodin (1985), supra n.41, p. 191.

<sup>62</sup> Goodin (1985), supra n.41, p. 191 & p. 203.

<sup>63</sup> Synder, J., ‘Needs exploitation’, (2008) *Ethic Theory Moral Practice* 11,389–405p. 393-394.

<sup>64</sup> Sufficientarianism is a theory of distributive justice. Rather than being concerned with inequalities as such or with making the situation of the least well off as good as possible, sufficientarian justice aims at making sure that each of us has enough. Gosseries, A., ‘Sufficientarianism,’ *Routledge Encyclopedia of Philosophy* (Taylor and Francis: 2011); see also Raz, J., *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford University Press, 1995), p. 9.

For application of sufficientarianism to exploitation theory see Mayer’s Sufficiency standard in Mayer, R., ‘Guestworkers and Exploitation’, (2005) *The Review of Politics* 67(2), 311-334, p. 312. See also Mayer, R., ‘Sweatshops, Exploitation, and Moral Responsibility’, (2007) *Journal of Social Philosophy* 38, 605-619. Mayer (2007) supra n.16 and Synder’s needs exploitation theory in Synder (2008) supra n.63, p. 395. Synder, J., ‘Exploitation and sweatshop labor: Perspectives and issues’, (2010) *Business Ethics Quarterly* 20 (2), 187-213. Synder, J., ‘Exploitation and demeaning choices’, (2013) *Politics, Philosophy & Economics* 12 (4), 345-360.

first is introduced by Mayer, who premises the benchmark upon a sufficiency standard ‘that judges transactions from the standpoint of those who have enough. Such agents are not exploitable, and if they would accept an offer it cannot be deemed exploitative.’<sup>65</sup> Mayer asserts that by seeking to ensure that everyone has enough establishes a standard of fairness based on sufficiency that is morally acceptable and could be considered as a benchmark for identifying exploitation.<sup>66</sup> However, taking into account the complexity of exploitative exchanges and the possibility for an exchange to be mutually advantageous, the threshold of the sufficiency standard can be bolstered by a further duty of beneficence that secures a decent minimum of welfare for humans.<sup>67</sup> Synder concurs with such a sufficientarian approach by proposing an emphasis on basic needs.<sup>68</sup> Thus, any duty of beneficence would seek to promote and facilitate access to basic requirements to achieve a decent minimum wellbeing.

The notion of well-being as a measure is also raised by Goodin, who considers that individuals have discretion as to when, where and how their own resources are directed towards others. However, when one enters into a relationship with a person who has deficits in their well-being the need to secure their welfare is engaged. For instance, in an employment relationship, ‘employers are required to cede as much of their benefit from the interaction to their employees as is reasonably possible toward the end of the employees achieving a decent minimum standard of living.’<sup>69</sup> This use of the sufficientarian approach is evident in national legal norms when defining decent labour practices. Rather than adopting a comprehensive outcome-based conception, a minimum threshold of employment conditions is set, expressed as protective labour standards e.g. minimum wage. From this minimalistic perspective, exploitation occurs in employment relations that fail to meet the protective threshold set by the minimum labour standards.

Importantly, both Mayer and Synder do not seek to encourage flourishing, any duty of sufficiency is fulfilled when individuals simply have enough. The justification for such an approach is premised upon the need to balance the interests of individuals

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<sup>65</sup> Mayer (Spring, 2005), *supra* n.64, p. 312; Mayer (Winter 2007), *supra* n.64; Mayer (2007) *supra* n.16.

<sup>66</sup> Mayer (2002), *supra* n.7, p.354; Mayer (Spring, 2005), *supra* n.64, p. 320.

<sup>67</sup> Similar approach to Goodin and Sample who approach exploitation theory via imposition of a duty to refrain from exploitation: i.e. duty to do no harm (see section 4) & duty to respect (see section 4).

<sup>68</sup> Synder (2008) *supra* n.63, p. 395.

<sup>69</sup> Goodin (1987), *supra* n.30, p. 396.

in securing freedom of choice and freedom to contract with the common good.<sup>70</sup> Importantly, these theories apply to both structural and relational interactions i.e. fostered by societal structures and between individuals. A focus on a decent minimum threshold may well open the Basic Needs Model up to criticism. More specifically, rather than going beyond Marxist theories, the sufficientarian rationale is in fact grounded in and dilutes such theories, since they stipulate that even where workers receive the necessary commodities and goods, they are still exploited by virtue of the surplus value produced from the work effort. Indeed, where a surplus of labour exists, workers have produced more than the required labour to acquire sufficient revenue in order to purchase the necessary commodities and goods, amounting to an unequal exchange and thus exploitation of labour.<sup>71</sup> Whereas, in the Basic Needs Model, exploitation only exists where access to a decent minimum well-being has not been achieved.

As a result, the parameters of the Basic Needs Model require further consideration in recognition of the critique of the application of a sufficientarian approach that simply seeks to secure the bare minimum. Indeed, where vulnerability and the level of dependence of the exploited party is at the root of the exploitation, Sample argues that it is important to go beyond minimum standards.<sup>72</sup> In particular, she argues that the decent minimum well-being should ensure ‘conditions of purposeful employment, the prerequisites of psychological well-being, and constraints on interaction that are necessary for self-respect.’<sup>73</sup>

The decent minimum well-being is envisaged as access to the basic goods necessary to live a distinctly human life.<sup>74</sup> However, we identify a limitation to the Basic Needs Model.<sup>75</sup> Nussbaum’s and Sen’s seminal work contradicts the suggestion that any decent minimum should simply ensure bare subsistence, rather human

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<sup>70</sup> Raz (1995), supra n.64. See also Dworkin in Davidov, G., ‘Distributive justice in labour law’ in Collins, H., Lester, G., & Mantouvalou V., (eds) *Philosophical Foundations of Labour Law*, (Oxford University Press, 2018), p. 148.

<sup>71</sup> Roemer (1982) supra n.18, p.163; Fleurbaey (2014), supra n.10, p. 654-655.

<sup>72</sup> Sample (2003), supra n.3, p. 75-76.

<sup>73</sup> Sample (2003), supra n.3, p. 74.

<sup>74</sup> Synder (2008) supra n.63, p. 395.

<sup>75</sup> Dahan et al acknowledge a vast body of critical discussion on the inadequacy of such minimum standards for securing human dignity and whether this sufficientarian minimalist approach is morally justified, see. Dahan, Y., Lerner, H., Milma-Sivan, F., ‘Global labor rights as duties of justice’, in Dahan, Y., Lerner, H., Milma-Sivan, F., (eds) *Global Justice and International Labour Rights* (Cambridge University Press, 2016), p. 66.

flourishing should be encouraged.<sup>76</sup> Sample applies this rationale to the duty of beneficence as discussed in the Human Dignity Model, wherein interaction with people ‘for the sake of advantage without regard for their ability to turn that interaction - including its compensation - into capabilities characteristic of at least a minimal level of human flourishing. Bare subsistence is not flourishing.’<sup>77</sup> In this regard, we consider that any attempt at imposing a decent minimum well-being should seek also to ensure respect for human dignity.

As with the other theoretical models, the elimination of exploitation under the Basic Needs Model considers the fact that exploitative interactions are those in which the capabilities of our interactors are ignored in the pursuit of their own advantage.<sup>78</sup> Thus conversely, non-exploitative relationships would be measured by acknowledgement of the needs of those with whom we are engaging.

The framing of the Basic Needs Model demonstrates that alone it is perhaps not robust enough to address exploitation. However, it certainly has value as it is applicable not only to intrapersonal relationships (relational) but also to economically derived relationships (structural). Therefore, it may well be an appropriate foundation from which to develop a hybrid model of exploitation, that acknowledges to varying degrees the normative foundations of each model outlined in the present typology. The constituent theoretical conditions of exploitation that are presented in Chapter 6 have been very much developed with such a purpose in mind. Before, presenting the conditions of exploitation we will briefly discuss the application of the typology in a contemporary context.

## **2. Applying the typology of exploitation to a contemporary understanding of labour exploitation**

As alluded to in the final lines of the previous section, we suggest that the application of the typology of exploitation to contemporary circumstances of labour exploitation requires a hybrid construction that takes into account not only the differences but also

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<sup>76</sup> Nussbaum, M., *Women and Human Development: The Capabilities Approach*, (Cambridge, Cambridge University Press, 2000); Sen, A., *Development as Freedom*, (New York: Anchor Books, 2000).

<sup>77</sup> Sample (2003), *supra* n.3, p. 167.

<sup>78</sup> Sample (2003), *supra* n.3, p. 80-81.

the similarities of each Model presented and the exploitation theories recounted therein. Thus, in the remainder of this chapter we will discuss three overarching points that we consider must be taken into account when identifying the conditions of exploitation in Chapter 6: the understanding of exploitation must go beyond mere economics (Section 2.1); the recognition of exploitation as mutually advantageous and consensual (Section 2.2); and the understanding of labour exploitation as a non-idealistic concept (Section 2.3).

## 2.1. Understanding exploitation beyond economics

First of all, we follow Wertheimer and posit that a contemporary understanding of labour exploitation must be ‘applicable to the full range of allegedly exploitative transactions,’<sup>79</sup> not just economic exchanges. Many political theories of exploitation focus upon the economic value of labour. However, the operationalisation of the value of labour is contested by exploitation theorists. For Marxists, the value of labour power is a homogenous and inalienable commodity in capitalist societies.<sup>80</sup> Alternatively, Roemer views the value of labour as a moralised concept in recognition of the impact of the labour on the individual worker.<sup>81</sup> In terms of the latter, labour relations represent a unique type of economic exchange as the commodity for sale (labour skills) cannot be separated from the subject who is selling said skills (the worker). Consequently, the reduction of the commodification of labour is, as Dahan et al suggest, one of the principle means by which to guarantee a life in dignity for all workers – a position which can be aligned with the Basic Needs Model that seeks to ensure a decent minimum of wellbeing (Section 1.3, Chapter 5).<sup>82</sup> However, despite the introduction of measures by the ILO and key international human rights instruments to ensure that minimum labour standards guarantee a life in dignity,<sup>83</sup> Dahan et al are sceptical as to the extent to which such standards, even if attained, would guarantee a life free from poverty and economic vulnerability.<sup>84</sup> This position is exacerbated, as Roemer notes,

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<sup>79</sup> Wertheimer, A., Millum J., & Schaefer, G. O., ‘Why Adopt a Maximin Theory of Exploitation?’, (2010) *The American Journal of Bioethics* 10(6), 38-39, p.39.

<sup>80</sup> Roemer, J., ‘R. P. Wolff’s Reinterpretation of Marx’s Labor Theory of Value: Comment’, (Winter, 1983) *Philosophy & Public Affairs* 12(1), 70-83, p. 79.

<sup>81</sup> Roemer (Winter, 1983), supra n.80, p. 80.

<sup>82</sup> Dahan et al (2017), supra n.75, p. 63. Zatz, N., ‘Discrimination and labour law’, in Collins, H., Lester, G., & Mantouvalou V., (eds) *Philosophical Foundations of Labour Law*, (Oxford University Press, 2018), p. 156.

<sup>83</sup> ILO, *Declaration on Fundamental Principles and Rights at Work and its Follow-up*, 18 June 1998, 1998; ILO Decent Work Agenda. Key International human rights instruments: UDHR, ICCPR, ICESCR.

<sup>84</sup> Dahan et al (2017), supra n.75, p. 65.

by the positioning of the market place as the sole locus of exploitative relationships and transactions, rendering exploitation economically market driven and non-relational,<sup>85</sup> resulting in an understanding of exploitation as an asocial phenomenon. For Yoshihara & Veneziani, it is important to ensure that any articulation of labour exploitation recognises it as a social phenomenon, acknowledging the possibility of it arising in interpersonal settings including non-market exchanges, whereby the situation and the characteristics of the individuals themselves are part of the assessment as to whether or not exploitation has taken place.<sup>86</sup>

## 2.2. Recognising exploitation as mutually advantageous and consensual

A second consideration of any application of the models of exploitation is the inevitability of mutual advantageous exploitation. As we described above, mutually advantageous exploitation is, according to Wertheimer, a situation wherein ‘A’ gains unfairly or excessively by an action or transaction that is beneficial to ‘B’, and can arise in unintentional, non-coercive and consensual transactions.<sup>87</sup> However, despite the benefit to B, the fact that A gains unfairly or excessively is the pivot for its characterisation as wrongful exploitation. In such cases, the harm or fairness will be determined according to objective criteria. Wertheimer and Zwolinski describe the calculation of the social surplus. Despite the fact that each of the parties may well be benefiting, the mutually beneficial exchange does not benefit one of them enough<sup>88</sup> or to assess whether degradation has caused harm to the person, and, if so, whether the degradation exceeds the benefits to B, all things considered.<sup>89</sup> Finally, Mayer suggests that mutually advantageous exploitation could arise from the imbalance of bargaining power meaning that individuals have no alternative and, as such, will always be forced to choose from a constrained set of options. Notwithstanding this, both parties gain from the transaction, but as these gains are disproportionate; the transaction is unfair. The lack of an alternative for the exploited party comes about as an insufficiency that results in that party or ‘B’ accepting a least-bad position or the lesser of two evils.<sup>90</sup> By

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<sup>85</sup> Roemer (1986), supra n.29, pp. 138-140, p.138.

<sup>86</sup> Yoshihara, N., & Veneziani, R., ‘Exploitation of Labor and Exploitation of Commodities: A “New Interpretation”’ (2013) *Review of Radical Political Economics* 45(4), 517–524, p.518.

<sup>87</sup> Wertheimer (1996), supra n.47, p. 208-209; Sample (2003), supra n.3, p. 29; Wertheimer (1996-1997), supra n.17, p.898.

<sup>88</sup> Zwolinski, M., ‘Sweatshops, Choice, and Exploitation’, (Oct., 2007) *Business Ethics Quarterly* 17(4), 689-727, p. 705.

<sup>89</sup> Wertheimer (1996-1997), supra n.17, p.898. Zwolinski (2011), supra n.12, p156.

<sup>90</sup> Mayer (Spring, 2005), supra n.64, p. 320

way of example, Mayer refers to sweatshop jobs that do not pay enough, even when they pay more than the alternatives. It is the insufficiency of the compensation that renders these jobs exploitative. The employer offers more than competitors but less than is sufficient.<sup>91</sup>

### 2.3. Understanding exploitation as a non-idealistic concept

Finally, we draw attention to the necessity of a realistic legal understanding of labour exploitation. This observation has emerged from the theoretical analysis of exploitation in literature that recognises that exploitation cannot always adopt a strict idealistic perspective. To explain the positioning of a realistic application of labour exploitation, the next few passages will examine the application of the tenets of distributive justice in the typology of exploitation theories and consider the limits of such a reading.

The representation of exploitation in literature has been closely aligned to distributive justice, where labour is recognised as a social practice and labour exploitation as a structural social injustice. However, we consider that it is important to acknowledge two limitations of any strict adherence to distributive justice. First, Collins reminds us that theories of distributive justice are reserved for state institutions. However in the context of labour exploitation the principles of distributive justice are applied to private employment relationships that are not always formalised.<sup>92</sup> Second, as Davidov highlights that the distributive justice paradigm is restricted to redistribution as a solution to economic inequality and is not applied to other forms of inequality.<sup>93</sup> In this regard, it is important to make note of Young's work that stressed that economic redistribution alone cannot resolve social injustices that arise from structural or systemic processes and institutions, even if the origin of the structural injustice was 'clean.'<sup>94</sup>

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<sup>91</sup> Mayer (Spring, 2005), *supra* n.64, p. 320

<sup>92</sup> Collins, H., 'Is the contract of employment illiberal?' in Collins, H., Lester, G., & Mantouvalou V., (eds) *Philosophical Foundations of Labour Law*, (Oxford University Press, 2018), p. 63-66. On distinction between labour law and labour market, and application of Rawls' difference principle to the latter, see Davidov (2018), *supra* n.70, p. 151.

<sup>93</sup> Davidov (2018), *supra* n.70, p. 144.

<sup>94</sup> Young, I. M., 'Five faces of oppression', in Seth N. Asumah & Mechthild Nagel (eds) *Diversity, Social Justice, and Inclusive Excellence: Transdisciplinary and Global Perspectives* (State University of New York Press, 2014), p.18; Young, I. M., *Justice and the politics of difference*, (Princeton University Press 1990); Wolff (2018), *supra* n.4, p. 186



Similarly, the presentation of exploitation theories has shown that they are grounded in norms of equality and fairness.<sup>95</sup> Rawls' theory of distributive justice emphasised the obligations and duties towards ensuring that individuals are assured a basic right to minimum guaranteed income standard of living that is based on a position of equal status. In particular, emphasis is placed on the centrality of fairness (original position behind a veil of ignorance) in ensuring a well-ordered society wherein political liberty and equal opportunity to access to social primary goods (income, wealth, self-respect) are guaranteed. Conversely, Rawls' difference principle does permit inequalities in the distribution of social primary goods in order to ensure that the least disadvantaged have equality of opportunity. However, Davidov indicates that the redistribution posited by Rawls' applies to the absolute position rather than the relative position of the least advantaged,<sup>96</sup> resulting in what Sen referred to as a bottom-up approach to redistribution whereby the worst off remain worst off in society.<sup>97</sup> Whilst Rawls' mechanism of redistribution has been critiqued more generally,<sup>98</sup> in the context of exploitation, any such economic redistribution would remove the worst off from a position of exploitation. Thus, whilst they remain the worst off in society, they are no longer exploited.

Ultimately, in order to recognise that exploitation has more than an economic impact, we posit that any redistribution mechanism that seeks to ensure equal status in society should also consider social/relational equality. This reading aligns with our above proposition that any conceptualisation of exploitation that is premised upon the Basic Needs Model must also draw upon aspects of the Human Dignity Model so as to ensure that individuals are not deprived of the means to develop capacities or basic capabilities, as emphasised by Sample.<sup>99</sup> Indeed, theorists who adhere to the norms of

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<sup>95</sup> For critical discussion of justice and fairness in labour exploitation see Dahan et al (2017), supra n.75, and Pogge, T., *John Rawls: His life and theory of justice*, (Oxford University Press, 2007).

<sup>96</sup> Davidov (2018), supra n.70, p. 148.

<sup>97</sup> Sen, A., 'Rauls v Bentham: An axiomatic examination of the pure distribution problem', in Daniels, N., (ed.) *Reading Rawls Critical Studies of Rawls' A theory of justice* (Stanford University Press, 1975), p. 284.

<sup>98</sup> See for instance impossibility of an open stable market in perfect competition in Martin, R., *Rawls and Rights*, (Lawrence: University Press of Kansas, 1985), p.157-159.

See for instance non-application of different principle to those who are unable or unwilling to work in Martin, R., *Rawls and Rights*, (Lawrence: University Press of Kansas, 1985), p. 177-178; No emphasis on flourishing, just ensuring that individual have the basic minimum needed, Martin, R., *Rawls and Rights*, (Lawrence: University Press of Kansas, 1985), p. 177.

See for instance focus on adjusting inequalities through economic means (monetary transfer schemes) and not through provision of welfare services in Michelman, F., 'Constitutional Welfare rights and A Theory of Justice', in Daniels, N., (ed.) *Reading Rawls Critical Studies of Rawls' A theory of justice* (Stanford University Press, 1975), p. 323.

<sup>99</sup> See also Young, I. M., 'Responsibility and Global justice: a social connection model', (2006) *Social Philosophy and Policy foundation* 102; Young, I. M., 'Responsibility and global labor justice' (2004) 4 *The journal of political philosophy* 365 and Nussbaum, M., *Creating Capabilities: The Human Development Approach*, (Harvard, Harvard University Press, 2011).

the Redistribution Model, such as Cohen and Arneson, also emphasise that equality of resources goes beyond income and wealth and should include equal opportunity of welfare (Arneson) or access to advantage (Cohen).<sup>100</sup>

### 3. Concluding remarks

The exploration of exploitation theory demonstrates that the understanding of exploitation in political theory is wide-ranging, and the threshold of the wrongfulness of exploitation varies. Nevertheless, the analysis has provided insight into how political theory can inform a legal conceptualisation of labour exploitation.

Crucially, we have demonstrated in this chapter that any conceptualisation of exploitation must go beyond economic relations and ensure that non-market relations are also incorporated. As such, the typology of exploitation reflects the need to ensure an approach that accounts for both structural and relational forms of exploitation, particularly as a number of converging queries have emerged regarding the outcome of the interaction for the exploited party – is harm required or can it be mutually beneficial? Is the vulnerability of the exploited party taking into account both *ex ante* and *ex post* the exploitative situation? To what extent can an individual consent to an exploitative situation and to what extent does the exploiter (either an individual or an institution) need to have foresight of the consequences on the individual's ability to live and work in conditions that are respectful of their human dignity?

Here, the emergence of respect for the dignity of others is of crucial importance to an overall understanding of exploitation in law that is equally human rights compliant. The normative theoretical understanding of exploitation as being contrary to human dignity, begins to converge with the foundational tenet of international human rights regime of respect for both rights and dignity as universal values.

Reflecting further on these and other queries, we will operationalise the typology by identifying, in the next chapter, the key conditions of exploitation that have emerged from the Models of exploitation. We will also begin to draw together the legal

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<sup>100</sup> Arneson, R.J., 'Equality and equality of opportunity for welfare', (1989) *Philosophical Studies* 56, 77; Cohen, G.A., 'On the currency of Egalitarian Justice', (1989) *Ethics* 99, 906.

and theoretical analysis in order to identify the synergies between the juridical and political understanding of exploitation.



## **CHAPTER 6 – The main conditions of exploitation emerging from political theory**

### **0. Introduction and structure of the chapter**

On the basis of the findings of Chapter 5, we understand that in exploitation, on the one hand, the advantaged party gains as a result of the harm to the exploited party (harmful exploitation). On the other hand, exploitation can be mutually advantageous and thus beneficial for both parties involved (mutually advantageous exploitation). However in the latter, each party's gain will differ, since A's gain is the result of the instrumentalisation of B.<sup>101</sup> Whilst identification of exploitation as harmful is clear cut, we believe that there is a need for clarification of the constituent conditions of exploitation in order to be able to better identify mutually advantageous exploitation.

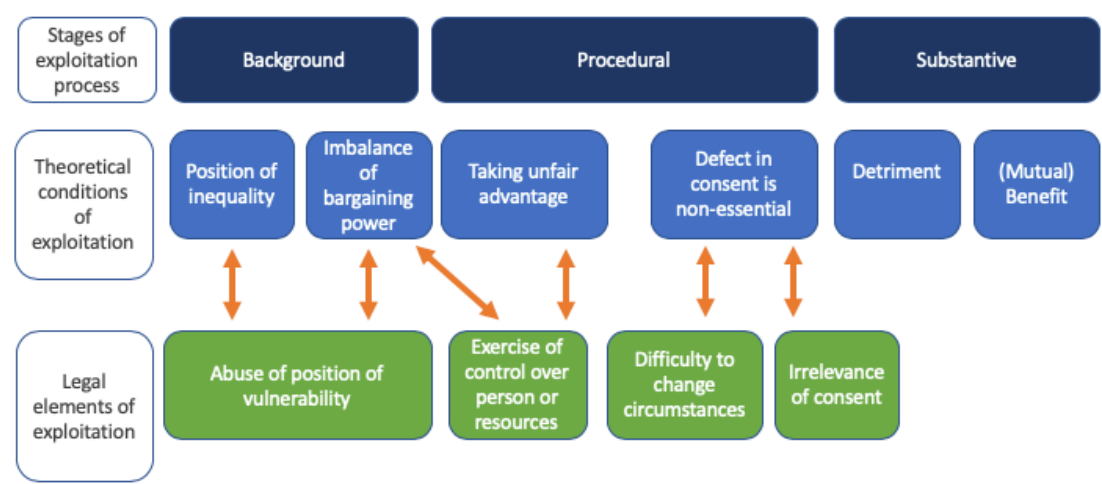
With this chapter we answer the following subsidiary research question: *What are the conditions of exploitation that emerge from theory?*

In the absence of a clear definition, we use the findings of Chapter 5 to categorise the different stages of the exploitation process and to identify the conditions needed to make exploitation possible. These conditions, together with the findings of

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<sup>101</sup> Mayer (2007) *supra* n.16, p. 139.

the legal analysis from Part 1, will then be operationalised in Part III of the thesis in the development of the analytical framework that will form the basis of the domestic case law analysis in order to see the extent to which judges apply these basic ingredients derived from political theory in their legal adjudication of the criminal provisions in domestic law.



**Table 2: The building blocks of exploitation: the synergies between the theoretical conditions and the legal elements in the exploitation process**

*Background conditions.* In the first two sections, we explore the background conditions of exploitation, namely the inevitable imbalance of bargaining power that emerges from the exploited party being in a position of inequality (Sections 1 & 2). The emphasis here predominantly lies on the background circumstances (*ex ante*) of both parties, in particular those of the exploited party. Such circumstances are considered to be influential towards the decision making process in engaging in a transaction/exchange or agreement and inform the presence of two conditions, namely, a position of inequality of the exploited party (Condition I) that creates an imbalance of bargaining power (Condition II). The inequality can be either the result of structural injustices or personal vulnerabilities of the individual.

*Procedural conditions.* We then shift our attention to two procedural conditions of an exploitative exchange and the deficiencies in the transaction that result from further background conditions. Primarily, from the perspective of labour exploitation,

the inherent inequality between parties (*ex ante*) must be further instrumentalised (*ex post*). As such, we identify the principal procedural deficiency as the abuse of the unequal exchange that leads to one party taking unfair advantage of the position of inequality (Condition III) – Section 3. Secondly, the procedural stage must also take into account the extent to which the situation is instrumentalised in an involuntary and non-consensual manner (Condition IV) – Section 4.

*Substantive conditions.* The final stage looks at the substantive (*ex post*) impact of the transaction, agreement or exchange on both parties. Two substantive conditions therefore consider the result of taking unfair advantage of an imbalance of bargaining power. The outcome for both parties varies and, in some instances, can be paradoxical. For instance, the stronger party may not actually benefit as anticipated when entering into the unequal exchange and the “disadvantaged party” may in fact benefit (Condition V) - Section 5. Nevertheless, the outcome of the process is to the detriment of the “disadvantaged party” when, all things considered, it can be objectively assessed as an affront to human dignity (Condition VI) – Section 6.<sup>102</sup>

The analysis reveals that inequality and unfairness are present at all stages of the exploitation process either *ex ante* or *ex post*. Inequality is discussed according to the pre-existing structural inequality of the background conditions of the parties to the exchange that then has an impact on how the exchange is handled (procedural). Unfairness is present either in the interaction (procedural) or in the outcome (substantive).<sup>103</sup> Highlighting the *fil rouge* of inequality and unfairness helps determine the point at which a relationship of power is not only unequal or unfair but also unjust and in need of legal intervention in order to prevent a violation of a person’s rights.<sup>104</sup>

Finally, in a last section, we consider the complex understanding that emerges from the exploration of exploitation theories and we query the extent to which different degrees of intervention may be required in response. As a result, a caveat to the

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<sup>102</sup> Affront to human dignity is understood broadly to include: lack of respect, degradation (Sample, Zwolinski) deprivation of capabilities of human flourishing (Wolff, Sen) and violation of human and labour rights (Manoutvalou), undeserved loss (Mayer, p.139)

<sup>103</sup> Procedural exploitation: the outcome of the exploitative act is unfair because of a defect in the process e.g. coercion, defrauded, manipulated; Substantive exploitation: the outcome of the exploitative act is unfair.

<sup>104</sup> Wood (2016), supra n.17, p. 97. See also Steiner (Jan., 1984), supra n.36, pp. 229-234.

conditions of exploitation emerges; namely that certain situations are seen as being the lesser of two evils leading to a *tolerance of exploitation* (Section 7).

## 1. A position of inequality (Condition I)

The typology of exploitation theories revealed the presence of both *ex ante* and *ex post* inequalities. In the first instance our attention goes to the *ex ante* conditions of inequality. Political theorists demonstrate that the source of inequalities are often derived from a number of unjust background conditions that can arise from both structural injustices or personal features:<sup>105</sup> as illustrated by Marx's unequal distribution of assets, Roemer's unequal initial distribution of the means of production, Synder & Mayer's lack of the means of subsistence and Zwolinski's lack of an alternative.<sup>106</sup>

The legal analysis also reveals a need for an inherent background feature that creates susceptibility to subsequent exploitation, however this is not expressed as a position of inequality, but rather as a position of vulnerability. The similarities between the two are that, both can be personal or structural and the existence of inequality or vulnerability *per se*, does not amount to exploitation, there needs to be something more. In exploitation theories, this is framed as 'taking unfair advantage' whereas in law it is framed as 'abuse of a position of vulnerability.'

Whilst regular employment relations are characterised by inequality and subordination, in the context of exploitation, Mantouvalou correctly asserts that such inequality leads to a position of great bargaining weakness that can lead to oppressive subordination.<sup>107</sup> Importantly, although structural and personal inequalities are a fundamental element of an exploitative relationship and are arguably ever present at the core of exploitation; their presence alone does not constitute exploitation *per se*, nor

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<sup>105</sup> Sample (2003), *supra* n.3, p. 82. See distinction made between vulnerability (inherent/personal) and precariousness (structural) in Atak, I., Nakache, D., Guild, E., Crepeau, F., "Migrants in vulnerable situations" and the Global compact for safe and orderly Regular Migration', (2018) Queen Mary University of London, School of Law, Legal Studies Research Paper No. 273/2018, pp.2-5.

<sup>106</sup> Sample (2003), *supra* n.3, p. 82; Attas, D., 'The case of guestworkers: exploitation, citizenship and economic rights', (2000) *Res Publica* 6, 73–92, p. 78; Synder (2013), *supra* n.64, p. 347-348; Zwolinski (2011), *supra* n.12, p.154.

<sup>107</sup> Mantouvalou (2018), *supra* n.34, p. 197.



does it infer that a position of inequality will inevitably result in exploitation. A person can be in a position of inequality and not be exploited.

The weight afforded to structural inequalities as opposed to personal inequalities has been subject to varying interpretations. Indeed, Wertheimer and Zwolinski downplay the importance of structural inequalities, as they may well be indicative of injustice but not of exploitation.<sup>108</sup> Zwolinski writes:

*It is precisely in the conditions that lie in the background of the exchange that the real injustice of sweatshop labor is to be found [...] this doesn't make it exploitative: What role, if any, should consideration of background injustices play in the correct understanding of exploitation? My answer, in brief, is that it should play fairly little. Structural injustice matters, of course, but it does not typically matter for determining whether a sweatshop is acting exploitatively, and it does not typically matter in a way that grounds any kind of special moral responsibility or fault on the part of sweatshops or the MNEs (multinational enterprises) with which they contract.*<sup>109</sup>

Conversely, others, including Wolff and Mantouvalou, argue that structural inequalities are to be the principal focus when seeking to clarify the scope of labour exploitation.<sup>110</sup> Indeed, this thesis recognises that the economic framing of labour exploitation does favour a focus on the structural inequalities. However, we contend that consideration of the imbalance of power in personal relationships and indeed between individuals is also vital, requiring – as Hill argues - contemplation of non-economical inequalities.<sup>111</sup>

Regardless of the source of the inequality (either personal or structural), this thesis suggests that consideration of the background conditions is necessary when assessing the extent to which the inequality of the bargaining position leads to an unfair advantage being taken in the procedure.<sup>112</sup>

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<sup>108</sup> Wertheimer (1996-1997), supra n.17, p.904.

<sup>109</sup> Zwolinski (2011), supra n.12, p155.

<sup>110</sup> Wolff (2018), supra n.4, p. 178, Mantouvalou (2018), supra n.34.

<sup>111</sup> Hill (1994), supra n.1, pp. 634. See also discussion on non-economical inequalities such as social, educational, caste, emotional and maturity in Haynes, D. F., 'Exploitation Nation: The Thin and Grey Legal Lines between Trafficked Persons and Abused Migrant Laborers', (2009) *Notre Dame Journal of Law, Ethics & Public Policy* 23(1), 1 -70, p. 10-12.

<sup>112</sup> Culiffe, J., 'A mutualist theory of exploitation?', in Reeve, S., (ed) *Modern Theories of exploitation* (Sage Publishing, 1987), p. 55.

## 2. An imbalance of bargaining power (Condition II)

A consequence of the position of inequality is an imbalance of bargaining power. The weight afforded to the imbalance of bargaining power differs (see Chapter 5). Culiffe and Roemer contend that exploitation stems from a structural imbalance of power derived from unequal access to the natural means of production.<sup>113</sup> Thereby, as Roemer writes, the antithesis to exploitation would be an equal initial distribution of the means of production.<sup>114</sup> Godels adopts a different approach arguing that such a structural inequality or injustice does not automatically amount to exploitation, as not all unequal positions derived from inequality in ownership of assets inevitably leads to exploitation.<sup>115</sup> Consequently, we can see that the determination of the imbalance of bargaining power using the Redistribution Model is easier to decipher, as the focus is on the *ex ante* inequality in ownership of assets rather than an *ex post* analysis of exploitation accounts.<sup>116</sup>

We note that the imbalance of bargaining power and the subsequent inequality in the forms of exploitation presented by the Human Dignity Model and Basic Needs Model could also be addressed *ex ante* by assuring that there is no abuse of vulnerability, non-degradation or respect or fulfilment of subsistence needs required for a decent minimum well-being. Again, as with the Redistribution Model, we acknowledge the limitations of such anti-thesis to exploitation noting that they cannot lead to an absolute situation of equality.

In capitalist labour relations, an imbalance of bargaining power is an inherent feature, despite asymmetry in bargaining power between two parties being a clear indication of an unequal situation. Consequently, Zatz notes that labour-market regulation seeks to restrain the inherent inequality of bargaining power in order to vindicate the principle that the labour of a human being is not a commodity.<sup>117</sup> Such regulation of employment relations is holistic, as shown by labour law provisions that

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<sup>113</sup> Culiffe (1987), supra n.112, p. 66; Roemer (1985) supra n.32, p. 65.

<sup>114</sup> Roemer (1985) supra n.32, p. 60; Roemer, J., 'What is Exploitation? Reply to Jeffrey Reiman', (Winter, 1989) *Philosophy & Public Affairs* 18(1), 90-97, p. 97; Roemer (Autumn, 1982), supra n.29, p. 305.

<sup>115</sup> Godels asserts that unequal burden or retrun are not necessary not sufficient for the occurrence of exploitation in Godels (1998), supra n.29, p. 453. See Veneziani (2013) supra n.14, p.528.

<sup>116</sup> Roemer (1985) supra n.32, p. 53.

<sup>117</sup> Zatz (2018), supra n.82, p. 156.

not only seek to minimise any possible abuse of an imbalance of bargaining power prior to entering into an employment relationship but also during its realisation.<sup>118</sup> However, in non-market labour relations, non-standard employment relationships (e.g. service providers or self-employed), or where there is non-compliance with the regulatory framework; then there is a need for mechanisms to determine the point at which the inequality in bargaining power becomes exploitative.<sup>119</sup>

Undoubtedly, the imbalance of bargaining power is a key element of exploitation which is illustrated by Mayer as the stronger party starting with more and using that advantage to gain at the expense of the disadvantaged party.<sup>120</sup> However, whilst the inevitability of the dominance and imbalance of power between the two parties can be viewed as a fundamental distributive injustice;<sup>121</sup> in order for *ex ante* position of inequality and an unequal exchange to qualify as exploitation there must be more.<sup>122</sup> Mere structural inequality where parties possess an unequal share of some divisible good does not go far enough.<sup>123</sup>

The legal analysis differs in this respect by placing an emphasis on the exercise of control rather than the imbalance of bargaining power. We nevertheless suggest that the exercise of control can be closely aligned to this second background condition wherein an imbalance of bargaining power is derived from a position of inequality. Here, we consider that the ability to exercise of control is made possible by an imbalance of bargaining power, however, the judicial understanding goes further by placing an emphasis on the means that are used to exert the exercise of control. Thus, in order to qualify a situation as exploitation, it is necessary to determine the impact of the instrumentalisation of the imbalance of power on other procedural and substantive aspects of the exploitation process and, of course, the outcome for both parties. Here the legal analysis can be of assistance in operationalising this theoretical condition.

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<sup>118</sup> Dahan et al (2017), *supra* n.75, p. 66.

<sup>119</sup> Dahan et al (2017), *supra* n.75, p. 66.

<sup>120</sup> Mayer (Spring, 2005), *supra* n.64, p. 331.

<sup>121</sup> See reference to Cohen's work in Furner, J., 'Marx with Kant on exploitation', (2015) *Contemporary Political Theory* 14(1), 23–44, see Mayer's discussion of Walzer in Mayer (2002), *supra* n.7, p. 337.

<sup>122</sup> See Mayer's discussion of Walzer's approach to dominance and the co-option of this discussion as a theory of exploitation in Mayer (2002), *supra* n.7, p.341.

<sup>123</sup> Mayer (2002), *supra* n.7, p.341.

### 3. Taking unfair advantage of the position of inequality (Condition III)

In the last two sections, we presented the background conditions of exploitation. The existence of imbalance in bargaining power may be an inevitable feature of labour relations; it does not *per se* lead to exploitation. However, it does characterise a situation that could be taken advantage of when it comes to making an offer. The procedural stage is therefore, characterised by an engagement or undertaking between the two parties, and the conditions therein are indicative of the process of engaging in an exchange, transaction or agreement.

Once the inequality between parties has been identified, merely taking advantage of an unequal exchange is not sufficient for exploitation. Whereas, as illustrated by Cohen, taking *unfair* advantage, reaches the threshold for exploitation and violates principles of distributive justice.<sup>124</sup> Goodin and Wertheimer also emphasise that since the moral wrong of exploitation is rooted in the notion of fairness then exploitation arises in an exchange or transaction when “A takes unfair advantage of B.”<sup>125</sup> Meyers considers the unfairness to amount to a situation wherein too much is being demanded of the individual.<sup>126</sup>

Theorists have outlined a number of different ways of determining what constitutes unfair advantage and a contested understanding emerges when establishing the benchmark of fairness and assessing the extent to which a situation is exploitative. Indeed, as Wood highlights: fairness and unfairness in transactions is a highly contextualised matter, depending on the details of particular social practices, so that wholly general principles regarding them would be virtually impossible to formulate.<sup>127</sup> This is evident in the typology of exploitation theories, where the act of taking advantage of a person is a key element, but exactly how that occurs varies: including, *inter alia*, by taking unfair advantage (Mayer), by failing to respect the other person (Sample) or by deviating from the market norm (Attas & Wertheimer).<sup>128</sup> Thus, the

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<sup>124</sup> Cohen (2011) *supra* 100, p.5; Wertheimer (1996), *supra* n.47.

<sup>125</sup> Goodin (1985), *supra* n.41, p. 194; Wertheimer (1996), *supra* n.47, p. 208.

<sup>126</sup> Meyers, C., ‘Wrongful beneficence: exploitation and third world sweatshops’ (2004) *J Soc Philos* 35, 319–333, p. 324.

<sup>127</sup> Wood (2016), *supra* n.17, p. 93

<sup>128</sup> van de Leun, ‘(EU) migration policy and labour exploitation’, Rijken, C., (ed.) *Combating trafficking in human beings for labour exploitation* (Wolf Legal Publishers, 2011), p. 435. Mayer (2007) *supra* n.16, p. 138; Sample (2003), *supra* n.3, p. 83-84 & p.87-88. Attas (2000) *supra* n.106, p. 75. In broad economic terms, Attas asserts that the act of taking advantage of a person is not required, as the unequal exchange is determined according to objective, market-based parameters that correspond to the neo-classical understanding of economic value. Namely, the value assigned to different goods and services will be determined by

fairness is considered either as *ex ante* or *ex post*, where the assessment of fairness is determined by either the outcome (*ex post*) or the background conditions of the parties (*ex ante*).

From the perspective of the Redistribution Model, where B gains an advantage, we support Wertheimer's position that the unfairness is determined according to an objective market price that a well-informed and unpressured seller would give to a well-informed and unpressured buyer in a competitive market.<sup>129</sup> Thus by determining how much a transaction has 'deviated from the market norm' will demonstrate whether or not the transaction amounts to exploitation. Wertheimer acknowledges the background structural conditions that could create injustice suggesting that any status quo is for society to reinstate.<sup>130</sup> However, the injustice of the background conditions is distinguished from the assessment of the fairness of the transaction which remains closely connected to the inter-relational exploitation, derived from the imbalance of bargaining power between two parties, rather than structural exploitation that has arguably created the inequality in the first instance. It must be noted that Synder argues that such a test of fairness fails to sufficiently take account of the impact of the background conditions that have in fact led to the 'breakdown in the functioning of the market' resulting in the need to hypothesise the fair-market price in the first place. Indeed, this is morally problematic, as the mere fact 'that an exchange is fair in the eyes of the market in no way guarantees that the resulting distribution of benefits will not leave one party without a decent minimum of well-being.'<sup>131</sup> The anti-thesis proposed by Synder is a standard of fairness or justice premised upon 'a fully fair or fully just world' whereby all unequal background conditions would be eliminated.<sup>132</sup> As Synder suggests 'these very high demands will often be impractical, however, in the actual, unfair world in which we live.'<sup>133</sup> In acknowledgment of the impracticality of assessing fairness in an unjust world, we advocate Davidov's "desert-based distribution,"<sup>134</sup>

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consumer demand and producer supply in perfect competition. Therefore, where prices or wages deviate in value, defined in this sense as the perfect equilibrium price, then there is an unequal exchange and a *prima facie* assumption that here is a case of market exploitation

<sup>129</sup> Wertheimer (1996), supra n.47, p. 220 & p.223; Synder (2008) supra n.63, p. 392. See also discussion of objective standards in comparative legal analysis (Chapters 8 & 9).

<sup>130</sup> Wertheimer (1996), supra n.47, p. 208 & p. 216; Wertheimer (1996-1997), supra n.17, p.900-901.

<sup>131</sup> Synder (2008) supra n.63, p. 392.

<sup>132</sup> Synder (2008) supra n.63, p. 391-392.

<sup>133</sup> Synder (2008) supra n.63, p. 393. We therefore acknowledge the impracticality of such a standard of fairness, that is also reminiscent of critiques of Rawls' veil of ignorance and original position.

<sup>134</sup> Davidov (2018), supra n.70, p. 143-147.

wherein an assessment of unfairness is premised upon whether or not the parties have gained more or less than they deserve.<sup>135</sup>

Theorists from the Human Dignity Model have acknowledged the importance of the background conditions that led to the unequal exchange when determining the unfair nature of a particular situation. Consideration of background conditions is essential, as very often the socio-economic background of the exploited parties contributes significantly to the imbalance of power at the procedural stage, leading to inequality of control and power in the labour process that may engender mistreatment, oppression and coercion.<sup>136</sup> In such cases an unfair advantage will have been taken where the individual in a superior position has played for advantage when morally bound not to, due to a moral responsibility to protect the weaker party.<sup>137</sup> Considering the extent to which an exchange is unfair can be assessed by the notion of fair play, which takes account of the contextual, subjective and relational value of the situation and examines social values in order to ascertain whether or not a particular situation is “inappropriate” and thus in non-conformity with said values.<sup>138</sup>

We recognise that the notion of fairness is therefore contested across the theoretical spectrum, especially since a fair transaction with no defect in the procedure does not guarantee that the resulting distribution of benefits will also be fair.<sup>139</sup>

#### **4. A defect of consent is nonessential (Condition IV)**

As with the legal analysis on the irrelevance of consent, the theoretical analysis of exploitation revealed that a defect in consent is non-essential, meaning that consent is irrelevant to the determination of the material scope of exploitation. The consent of the exploited party comes into play during the procedural stages of an unequal exchange. In order to determine whether the exploiter has taken unfair advantage of the imbalance

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<sup>135</sup> Dahan, Y., Lerner, H., Milma-Sivan, F., ‘Global justice, labor standards and responsibility,’ (2011) *Theoretical Inquiries in Law* 12, 439, p. 445.

<sup>136</sup> Brewer (1987), *supra* n.10, p. 12.

<sup>137</sup> Goodin (1987), *supra* n.30, p. 167

<sup>138</sup> For discussion on fair play and assessment of situations where there is wrongful taking advantage in Goodin (1987), *supra* n.30, p. 185-186.

<sup>139</sup> Wertheimer (1996), *supra* n.47, p. 226. This is similar to Roemer’s understanding that there is a possibility of subsequent inequality or injustice as a result of differentiation and variation in the distribution of and access to the means of production. However, such an occurrence does not automatically amount to exploitation. See Chapter 5.

in bargaining power in an unequal exchange, three perspectives of voluntariness and consent emerge from the theoretical analysis that we have characterised as: i) **non-consensual unequal exchange** – characteristic of harmful exploitation and ii) **consensual unequal exchange** – characteristic of mutually advantageous exploitation. Ultimately, iii) **quasi-consensual unequal exchange** represents the “grey-area” which is a specific point of interest for exploitation theorists, such as Wertheimer, wherein despite the exercise of the individual’s agency and consent, the unequal exchange amounts to exploitation justifying legal and policy intervention.<sup>140</sup>

The three situations above demonstrate that a defect in consent is not an essential condition. Therefore, regardless of the extent to which an individual has consented, the ultimate impact on the individual’s agency is, as Wolff highlights: ‘the exploiter is to use another’s circumstances to obtain their actual compliance with a situation.’<sup>141</sup> In this regard, when formulating the conditions of exploitation, this thesis is particularly interested in the latter two where the individual appears to have consented to the exploitative situation.

*i) Non-consensual unequal exchange.* Harmful exploitation or a forced exchange is characterised by a lack of consent, which is often derived from coercion. With the close connection between exploitation and coercion in mind, Wolff’s explanation of the distinction between the two concepts is as follows:

*Exploitation is typically a matter of using another person’s vulnerability to your own advantage. Coercion, on the other hand, typically proceeds by first creating another’s vulnerability and then exploiting it. It involves the difference, then, between happening upon exploitable circumstances and generating them.*<sup>142</sup>

The extent to which these two concepts may overlap is contested by Hill, as coercion characteristically involves *threats* by which the coercer proposes to make her victim *worse* off unless she does as the coercer demands. Hill writes that exploitation, in contrast, often involves *offers* by which the exploiter proposes to make her victim

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<sup>140</sup> Wertheimer (1996), supra n.47, p. ix.

<sup>141</sup> Wolff (1999), supra n.11, p.115.

<sup>142</sup> Wolff (1999), supra n.11, p. 111.

*better* off if she does as the exploiter proposes.<sup>143</sup> We will see such examples in the findings of the case-file study, wherein victims of exploitation have received offers that *prima facie* will make them better off in Chapter 9. Roemer concedes that the understanding of exploitation does not conceive of dominance or force as prerequisite components of exploitation.<sup>144</sup> However, this position has been critiqued by Veneziani and Mayer for failing to take into account characteristics of the interaction between A and B such as asymmetric relations of power,<sup>145</sup> that, as a result, could lead to a exploitative transaction involving both an offer or a threat,<sup>146</sup> depending on whether or not force or coercion are employed. This thesis supports this critique, since the complexity of the phenomenon means that it cannot only be restricted to situations where an offer has been made.

**ii) *Consensual unequal exchange.*** Wertheimer claims that a defect in consent is not a necessary condition of exploitation, suggesting that wrongful exploitation is possible even in circumstances where an individual has consented, a similar line of reasoning was adopted by the ECtHR in *Chowdury*.<sup>147</sup> Sample also concurs that a coercive relationship or exchange is not a prerequisite for exploitation, voluntary relationships are also candidates for the judgement of exploitation.<sup>148</sup> Nevertheless, Wertheimer further develops the understanding of consensual unequal exchange, arguing that it requires a different level of assessment as the moral and legal relationship between the parties to an agreement has been transformed.<sup>149</sup> For instance, it may be that despite the consensual nature of the agreement, the unequal exchange objectively involves some form of degradation and suffering as well as unfairness, that it is necessary to consider the “mutually advantageous” unequal exchange to amount to wrongful exploitation.<sup>150</sup>

**iii) *Quasi-consensual unequal exchange.*** Attas’ work argues that, in harmful exploitation ‘there must be some minimal force or deception involved, in the sense that

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<sup>143</sup> Hill (1994), supra n.1.

<sup>144</sup> Roemer (1985) supra n.32, p. 44; Roemer (Winter, 1989), supra n.114, p. 96-97; Reiman (Winter, 1987), supra n.37, p.28.

<sup>145</sup> Veneziani (2013) supra n.14, p.527.

<sup>146</sup> Mayer (Spring, 2005), supra n.64, p. 319.

<sup>147</sup> A defect in consent manifests in two main ways: first a defect in B’s objective situation such as fraud, undue influence, duress, coercion, force; and secondly a defect in B’s capacity as a decision maker within B’s objective situations such as false consciousness, inequality of bargaining power and hard circumstances. For Wertheimer the latter examples do not in themselves constitute a defect on consent, rather they are circumstances that compromise the autonomy of the individual. Wertheimer (1996), supra n.47, pp. 247-270. See discussion on rational choice in Hill (1994), supra n.1.

<sup>148</sup> Sample (2003), supra n.3, p. 29

<sup>149</sup> Wertheimer (1996-1997), supra n.17, p.890.

<sup>150</sup> Wolff (1999), supra n.11, p. 111.



the exploited person is unsatisfied by this inequality in values exchanged, and would choose not to exchange at these terms if he or she were aware of this and the choice in question were available.<sup>151</sup> In this context, he suggests that it is sufficient for force to be equivalent to an individual having ‘the range of acceptable or reasonable options restricted in such a way that it leaves [the individual] with no real choice’ as they find that they are unable to change their circumstances due to a lack of alternative options.<sup>152</sup> We build upon Attas’ elaboration of consent by suggesting that such an argument can be interpreted as compulsion, manifesting as a consensual agreement, but ultimately leading to an interpretation of the unequal exchange as *quasi-consensual*. We have seen the effect of *quasi-consensual* unequal exchanges in the first part of the thesis and this is also an issue that arises in the findings of the file study.

A brief overview of the Marxist distinction between unfree and free workers will shed some light on the interconnectedness between compulsion and consent. Two forms of compulsion are identified: legal and economic. Legal compulsion may be applied directly by the State in the form of a *corvée*, or indirectly, by means of lump-sum taxes on productive abilities. In both cases, the political authority has a legal title to the agent’s productive ability. Economic compulsion is a less straightforward notion. It assumes that the agent is legally free to dispose of their time and abilities but possesses insufficient sources of non-labour income to be able to subsist without working.<sup>153</sup> Therefore, the inability for workers to exercise meaningful bargaining power over their labour conditions due to their socio-economic status and/or their political status can be viewed as forced exchange, but it may well be that the situation is consensual, hence the articulation of a *quasi consensual unequal exchange*.<sup>154</sup> Economic compulsion has also been articulated by Synder as the “demeaning choice” of an individual where the voluntariness of an individual is put into question when the exploitative interactions are degrading towards individuals, as it does not offer sufficient progress towards a decent minimum of human functioning.<sup>155</sup> The compulsion to ‘accept an offer that improves the exploitee’s human functioning

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<sup>151</sup> Attas (2000) supra n.106, p. 75

<sup>152</sup> Attas (2000) supra n.106, p. 75

<sup>153</sup> Carver (1987), supra n.20, p.85.

<sup>154</sup> For practical application of the *quasi-consensual unequal exchange* literature has explored the plight of guestworkers is an example that is in literature to demonstrate the unequal exchange, that could be tantamount to exploitation, as a result of less bargaining power derived from legal status see Garcia, R., ‘Labor as Property: Guestworkers, International Trade, and the Democracy Deficit’, (2006) *The Journal of Gender, Race & Justice* 10, 27-65; Attas (2000) supra n.106; Mayer (Spring, 2005), supra n.64; Walzer, M., *Spheres of Justice: A Defense of Pluralism and Equality*, (New York: Basic Books, 1983), p. 59.

<sup>155</sup> Synder (2013), supra n.64, p. 347. See also Sample and degradation.

insufficiently’ also impacts on their ability to protest against their mistreatment and structural change toward more just conditions.<sup>156</sup> The individual’s “surface endorsement” of a demeaning choice is contended to be problematic as it not only demonstrates an ‘acquiescence to a degraded state of life’ but it also ‘leaves the exploited party without some of these necessary goods, but also because it removes the excuse of force or coercion present in other degraded interactions.’<sup>157</sup>

Ultimately, the lack of alternatives experienced by many who enter into a mutually advantageous exploitative transaction impacts upon the extent to which interventions are made to remedy the morally wrong exploitation, in recognition of the fact that the exploited party is nevertheless gaining from the situation. Nevertheless, the “coercion of economic necessity” arising from poverty necessarily limits the choices available, resulting in decision-making based upon the least-worse option.<sup>158</sup> It is for this reason, that we propose the application of a variation of Wertheimer’s objective market price (see Section 3 & Section 5) to contemporary labour exploitation. It is common for exploited foreign workers to exercise their agency and consent to working conditions that are not in compliance with the labour standards of the country where the exploitation takes place. As a result, individual workers do not always recognise that their situation amounts to exploitation as the conditions are better than that of their country of origin, as we will see in later chapters (Chapters 9 & 11).

The application of Wertheimer’s objective market test emphasises the importance of the legal and policy framework of the standards of the country of destination (equivalent to the well informed or unpressured buyer) as the benchmark for assessing exploitation and not those of the country of origin.<sup>159</sup> Inevitably, the application of objective tests must be cognisant of a possible conflict between the autonomy of the worker to make choices provided by the flexibility of the market and the protection of worker’s rights, requiring a balancing exercise that does not undermine the autonomy of worker. We will discuss later on in more detail the challenge of balancing the protection of rights of migrant workers in a market economy

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<sup>156</sup> Synder (2013), *supra* n.64, p. 347 & p. 350.

<sup>157</sup> Synder (2013), *supra* n.64, p. 353.

<sup>158</sup> Zwolinski (Oct, 2007), *supra* n.88, p. 692.

<sup>159</sup> European Union Agency for Fundamental Rights, *Severe labour exploitation: workers moving within or into the European Union States’ obligations and victims’ rights*, June 2015p.12.

with the need to ensure that a paternalistic interventionist approach does not impede the autonomy of the worker (see Section 7 tolerance of exploitation).<sup>160</sup> For now, we will move to the substantive conditions that will be of use when determining whether or not the procedural conditions such as taking unfair advantage and consent do in fact amount to a defect on the structural or relational interaction.

## **5. The outcome of an exploitative exchange as (mutually) beneficial (Condition V)**

For the stronger party, the intended outcome of an unequal exchange is the accrual of a benefit. The purpose of obtaining a benefit is an essential condition of exploitation. However, the extent to which the purpose is achieved is non-essential. For instance, it is not necessary for the envisaged benefit or gain to have materialised, and in such circumstances, does not preclude the possibility of identifying the situation as exploitative. Similarly, where a benefit has materialised, it does not have to be disproportionate or excessive.

Where a benefit has been accrued, Wertheimer's calculation of the "hypothetical fair market price" can once again be applied in order to calculate the substantive fairness.<sup>161</sup> The calculation will not only be based upon the outcome but also the conditions under which the transaction took place, according to the "zone of agreement," the outer boundaries of which are:

*A's actual reservation price (the minimum price the party would be willing to accept and depends upon the knowledge of the market price etc.) and A's morally justified reservation price (the highest amount that they will ask). It is important to note that the morally justified reservation price is a baseline and not a ceiling, therefore how much more than the baseline one may take without exploiting the other party depends on the scope of the bargaining zone or zone of agreement.*<sup>162</sup>

We agree with Valdman that the benefits must equate to the same benefits that would have been received had the transaction been concluded with someone in a

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<sup>160</sup> Van de Leun (2011), supra n.128, p.437-438.

<sup>161</sup> Wertheimer (1996), supra n.47, p. 232.

<sup>162</sup> Wertheimer (1996), supra n.47, p. 214

position of equality and as a result is considered to be rational, informed, and could reasonably refuse the offer.<sup>163</sup>

It is also important to note, once again, that it is also possible for the exploited party to have gained from the unequal exchange (see mutually advantageous exploitation) and, therefore, it is not essential for an exploited party to be worse-off. Therefore, we make a distinction between a mutually advantageous unequal exchange and mutually advantageous exploitation as, in the case of the latter, the benefit is accompanied by a detriment, to which we will now turn.

## **6. A detriment as the key distinction between unequal exchange and exploitation (Condition VI)**

Whilst harm is one possible outcome of an exploitative transaction, it is not essential. Such an approach is recognised by many theorists and recognises the subtle outcomes of exploitation, as Wolff writes:

*To be an exploiter is to use another's circumstances to obtain their actual compliance with a situation without having sufficient regard to whether that situation violates fairness, flourishing, or suffering norms. To be exploited is to be treated in this way, **whether or not actual harm is suffered.*** [Emphasis added]<sup>164</sup>

The above citation is not only illustrative of the non-essential requirement of harm, but it also reiterates the discussion regarding the agency of the individual and highlights the variety of ways in which the outcome can be to the detriment of the exploited party due to the exploiter failing to adhere to their 'moral obligation not to extract excessive benefits from people who cannot, or cannot reasonably, refuse our offers.'<sup>165</sup> The latter point here converges with the legal analysis that places an emphasis on the lack of alternative choices leading to a difficulty to change their circumstances (see Section 1, Chapter 4). Whilst the difficulty to change their circumstances is derived from an imbalance of bargaining power and voluntariness (see

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<sup>163</sup> Valdman (2009), supra n.42, p. 12-13.

<sup>164</sup> Wolff (1999), supra n.11, p.115.

<sup>165</sup> Valdman (2009), supra n.42, p. 3

consent above), there is also a detriment: namely the continuation of the exploitation due to an impossibility to change their status (as illustrated by the *Chowdury* case in Part I). As mentioned before, a position of vulnerability or inequality must be assessed in order to determine the impact of the exploitation (the detriment). Overall, the exploitation theories we have discussed greatly differ with regard to the types of advantages or inequalities deemed unexploitable, leading to a distinction between those theorists that use fairness as a measure of exploitation on the one hand and the impact on the individual's dignity on the other hand.

First of all, regardless of the detriment encountered, some theorists, such as Wertheimer, assess the outcome of the situation by attributing it to the notion of fairness. However, unlike the emphasis on transactional specific fairness as a procedural element of exploitation, the understanding of fairness relates to substantive fairness. Here, Wertheimer draws upon the Marxist contribution principle that considers “fair” the distribution of any surplus value produced. Exactly how the distribution should occur in order to be fair is not easily calculated; as such a distribution should reflect the parties' contributions to the social surplus: the principle of contribution. However, the ‘difficulties in the way of measuring an individual's contribution in an interdependent system do not show that the concept of an individuals' contribution is incoherent. They do suggest that the principle of contribution is unlikely to provide a stable basis for fair transactions upon which parties could reasonably concur.’<sup>166</sup> In the legal understanding of labour exploitation, the notion of decent work and the conditions attached to decent work are considered as a baseline for fairness and could be considered also as criterion for the implementation of the contribution principle. Where these conditions are not met, then they are indicative of both procedural and substantive unfairness, as it can be that both the conditions are misrepresented in the transaction, resulting in the actual working conditions being in non-conformity with the minimum standards.

For other theorists, such as Wood, Mayer and Sample, any moral assessment premised upon fairness is limited for determining the outcome of the unequal exchange on the exploited party.<sup>167</sup> As a result, rather than seeking to identify a tangible

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<sup>166</sup> Wertheimer (1996), supra n.47, p. 229

<sup>167</sup> Mayer (2002), supra n.7, p. 339-340.

disadvantage, fairness has been set aside leading to a shift away from a distributive-justice approach that is advocated by those who consider the threshold of exploitation to be premised upon the material outcome, identified as either unfair advantage or undeserved loss. Instead, the focus is on the impact on the individual's dignity. For instance, Wood argues that exploitation is humiliating and degrading but not necessarily unfair. Here, exploitation is understood as a beneficial 'playing on some weakness or vulnerability.'<sup>168</sup> Similarly, whilst Sample accepts that exploitation is an action that is taken for the sake of further advantage, the focus is on the use of another person to advance one's ends.<sup>169</sup> Rather than unfairness being the moral element of exploitation, Sample suggests that the principal feature for determining the wrong of exploitation lies in the inherent lack of respect for others (degradation) and in particular the disrespectful use of their genuine need (vulnerability) that is used for the sake of advantage.<sup>170</sup> We will consider this further in the file study where Belgian domestic law has placed significant emphasis on certain working conditions as an affront to human dignity as the key point of departure for assessing the detriment in labour exploitation (see Chapters 8 & Chapter 9).

Importantly, the presence of a detriment to the exploited party is a crucial condition, that requires an assessment on an objective basis. Its presence is therefore essential whereas, by contrast, as we highlighted in the previous section, the fulfilment of the first substantive condition (a benefit) is not essential to classifying a situation as exploitation. The purpose of engaging in the unequal exchange is the envisaged benefit. However, it is not essential for the benefit to materialise and, indeed, it is possible for the benefit to be mutual.

We have discussed the latter point of mutually advantageous exploitation in both the context of procedural conditions – in relation to consent - as well as in the discussion regarding the substantive outcome being beneficial to both parties. It is on this point that we now turn to a *caveat* that we must acknowledge: the tolerance of exploitation. Regardless of the articulation of the conditions of exploitation, is it possible that in

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<sup>168</sup> Wood, A., 'What is exploitation?' (1995) *Social Philosophy and Policy* 12(2), 136–158pp. 146, 151– 154 & see reference to Wood in Furner (2015) *supra* n.121.

<sup>169</sup> Sample (2003), *supra* n.3, p. 14-15.

<sup>170</sup> Sample (2003), *supra* n.3, p. 75.

certain circumstances and, in light of the possible benefits to the weaker party, there are some instances in which exploitation should be tolerated?

## 7. A caveat to the conditions of exploitation: tolerating exploitation as a lesser evil?

*If the unfairness is modest, and the transaction produces significantly better consequences for the disadvantaged party than the likely alternative, **we ought to tolerate the exploitation as a lesser evil**. Prohibiting the exchange will do more harm than good, especially for the one who is vulnerable. **Sometimes exploitation is the lesser evil** [emphasis added].*<sup>171</sup>

Robert Mayer's citation summarises a key caveat to any attempt of articulating the key conditions of exploitation: the tolerance of exploitation. In particular, when referring to situations of mutually advantageous exploitation, individuals are free to enter such relationships where the result may well be unfair but ultimately the transaction produces significantly better consequences for the disadvantaged party than the likely alternative. It may be that prohibiting the exchange will do more harm than good, especially for the one who is vulnerable and as a result, exploitation may occur where in spite of the wrongful character, it is morally permissible when all other countervailing considerations are taken into account.<sup>172</sup> However, the tolerance of exploitation is not absolute and, as Mayer describes, will only be accepted where: i) the exploitation is modest, not severe, and ii) this exploitation significantly enhances the well-being of the exploited party compared to the most likely clean-hands alternative.<sup>173</sup> Goodin stresses that the tolerance of exploitation does not mean that any objections premised upon morality or fairness are completely discarded, instead such objections are overridden.<sup>174</sup> Where the possibility of being exploited is better than the alternative,<sup>175</sup> then it is possible to justify the non-enforcement of any prohibitions that seek to prevent such exploitative exchanges.<sup>176</sup>

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<sup>171</sup> Mayer (Spring, 2005), supra n.64, p. 328.

<sup>172</sup> Goodin (1987), supra n.30, p. 173; Mayer (Spring, 2005), supra n.64, p. 319. See Section 5 & Section 6.

<sup>173</sup> Mayer (Spring, 2005), supra n.64, p. 327-329.

<sup>174</sup> Goodin (1987), supra n.30, p. 173.

<sup>175</sup> Mayer (Spring, 2005), supra n.64, p. 319.

<sup>176</sup> Wertheimer (1996), supra n.47, p. 34.

Globalisation, as highlighted by Sample, has had an impact on such tolerance of exploitation. Whilst in and of itself it is not inherently exploitative; some globalising processes create exploitation. Thus, there is a balance to be struck between those cases that are so morally wrong that they must be prohibited, and those exploitative interactions that do not always warrant interference because they improve the situations of both parties, and interaction on less exploitative terms may not be forthcoming.<sup>177</sup> Indeed, this understanding of exploitation complicates the moral analysis of globalisation.<sup>178</sup> However, it is important to note that even prior to globalisation, exploitation was tolerated in pre-capitalist societies. Indeed, Sample highlights the societal endorsement of exploitation in relation to the promotion of slavery which was a socially acceptable convention prior to its global prohibition.<sup>179</sup> Society's recognition of the legitimacy of exploitative practices renders prohibition, social sanction or codification of exploitation and oppression as norms a complex task<sup>180</sup> as 'exploitative interactions are systematically favoured and promoted [...] as normal.'<sup>181</sup>

Using the conditions listed in this chapter, we identify three situations that can determine whether or not law or policy should intervene in a particular situation of exploitation according to the moral value of the situation: i) *strategic intervention* ii) *non-worseness* and iii) *non-paternalistic intervention*.

First of all, *strategic intervention* presumes that a mutually advantageous and consensual agreement should be permitted even when it is exploitative, precisely because the moral force of exploitation is relatively low.<sup>182</sup> Wertheimer explains that where strategic intervention occurs, it is often to ensure that the exploitation of B does not then lead, *ex ante*, to the exploitation of a class of B's. For instance, the prohibition of B from accepting a subminimum wage, even though it may be a mutually advantageous transaction, seeks to ensure that other members of the class of B's will

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<sup>177</sup> See also discussion in the context of irregular migration and those individuals who exercise agency to remain in an irregular position in Oudejans, N., 'The Right not to Have Rights: A New Perspective on Irregular Immigration' (2019) *Political Theory* 1–28.

<sup>178</sup> Sample (2003), *supra* n.3, p. 132.

<sup>179</sup> Sample (2003), *supra* n.3, p.54 & p. 61.

<sup>180</sup> Laycock, H., 'Exploitation Via Labour Power In Marx', (1999) *The Journal of Ethics* 3, 121–131, p. 125.

<sup>181</sup> Note the discussion in Sample that critiques Goodin's consideration of exploitation as taking advantage of an unusual situation. However, it is important to note that Goodin, in his original text, also recognises that exploitation can include making unusual use of perfectly ordinary circumstances and such use is non-standard or non-paradigmatic, it *does not* have to be rare or uncommon. See Sample (2003), *supra* n.3, p. 61. and Goodin (1987), *supra* n.30, p. 166-170.

<sup>182</sup> Wertheimer (1996), *supra* n.47, p. 296; Mayer (Spring, 2005), *supra* n.64, p. 328.



not be employed for a subminimum wage.<sup>183</sup> The strategic argument for the prohibition of mutually advantageous exploitation applies only when the prohibition is, in fact, beneficial to B, *ex ante*, as when A would otherwise be able to exploit a monopoly position *vis-à-vis* (a class of) B.<sup>184</sup>

In the Redistribution Model, exploitation is an inherent feature of capitalist society. Therefore, the tolerance of exploitation by way of strategic intervention is characterised by prohibition of exploitation through legal regulation, but due to a lack of enforcement (non-interference), the practices are nevertheless supported (tolerated) politically, legally and in society, as highlighted by Haynes:

*We feel that it is "wrong" to exploit people, and so we pass laws to punish the wrongdoers and to protect their victims. But we rarely apply the laws, rarely advertise their existence to those in need, and sometimes criminalise those who attempt to access them.*<sup>185</sup>

The adherence of societies to the free-market political economy means that the tolerance of exploitation is justified precisely because of the presumed improvement to their (economic) well-being. The danger is that law and policy wholly apply strategic intervention and do not consider the option of perfectionist intervention. Or where a perfectionist interventionist position is adopted to tackling exploitation of labour (e.g. UK Modern Slavery law and policy) any added value is diminished as the result of conflicting policies that adopt strategic intervention (e.g. UK immigration policy) to tackling illegal working. Such an approach fails to take into consideration that a non-exploitative job would be more likely were access to the labour market facilitated by regular migration channels. One justification for such a varied response is that there is very often a lack of awareness and understanding of the reality of labour exploitation that leads to a reinforcement of stereotypical understandings of human trafficking (as we have discussed in Section 2.2 of Chapter 1). Where such conflicting policy measures

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<sup>183</sup> Note that Wertheimer stresses that strategic intervention is not watertight, as it may mean that strategic intervention may sometimes work to the detriment of the "worst-off". This may occur in labour markets e.g. minimum wage example. Consumer markets where contractual terms, safe product etc. price out the market those who would prefer harsher contractual terms (and lower price) or a substandard product to getting nothing at all, Wertheimer (1996), *supra* n.47, p. 301.

<sup>184</sup> Wertheimer (1996), *supra* n.47, p. 303.

<sup>185</sup> Haynes (2009), *supra* n.111, p. 13-14.

exists, the legal framework must be robust and clear enough to challenge such misrepresentations.

Second, *non-worseness* (or dirty hands) is also applicable to the non-interference of exploitation in accordance with the Basic Needs Model.<sup>186</sup> Here, the choice of the exploited party to accept less benefit from the transaction than is deserved is, according to Synder, considered to be a rational one given the lack of preferable options. The acceptance of exploitation is based on the fact that condemnation of a (voluntary) interaction that leaves the exploitee better off than they would have been had the so-called exploiter never entered into the interaction at all. The non-worseness claim challenges the idea that it can be morally worse for an individual A to make a mutually beneficial offer to an individual B, if A is not obligated to make any offer to B at all. The non-worseness claim revisits the obligations that are placed on individuals to help others in need: the need to discharge a duty of beneficence. The threshold for discharging such a duty should be premised on the standard that a transaction, which may well confer some benefit, does not benefit one party sufficiently from the perspective of what is owed morally to that person.<sup>187</sup>

Third, the tolerance of exploitation may also be justifiable on the basis of *non-paternalistic intervention*. Here Zwolinski describes non-paternalism as a way of showing respect for the autonomy of workers' freedom to choose their working conditions, whilst acknowledging that even a worker loses some of their rights as a consequence of the exercise of their autonomy of choice. Any limitation to their autonomy must safeguard against an overbearing paternalism. Prior to any interference with the worker's autonomy, an assessment of the context is needed in order to determine the extent to which intervention measures are proportionate in accordance with the circumstances must be carried out. Notwithstanding this, such tolerance is not

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<sup>186</sup> Wertheimer (1996), *supra* n.47.

<sup>187</sup> NB Synder also discusses the distinction between exploitation and neglect, the moral obligation that is placed on individuals to help others in need extends beyond the exploitation model. Both are morally reprehensible but equally can be subjected to the non-worseness claim.

And Synder discusses the distinction between, i) the person who does nothing to help those around him (the negligent person); ii) the person who partially discharges these obligations through mutually beneficial transactions (the exploiter); iii) the person who engages in some generally beneficent actions or takes some steps toward discharging a general political responsibility. Here there is a sliding scale of "morally worse behavior", and it is for the non-worseness claim to determine the position the "middle man" faces with regards to the moral compass of the situation. See Synder (2013), *supra* n.64, p. 348-350.

absolute and may only be justified in certain circumstances. Ultimately, the burden of proof should shift to those who wish to intervene to provide a justification.<sup>188</sup>

Finally, the tolerance of exploitation accepts the fluid nature of exploitation, recognising that there are lesser, moderate, and severe forms of exploitation. However, the impact of this understanding on the conceptualisation of exploitation will be that the “grey” area between non-exploitation and exploitation that is even more difficult to clarify. Whilst the tolerance of exploitation advocates for the immorality of the exploitation to be overlooked (not erased or cancelled) due to the fact that the exploitation is the lesser of two evils, this should not detract from attempts to clarify the conceptual nature of exploitation.

## **8. Concluding remarks**

By using the typology of exploitation theories presented in Chapter 5 and reflecting on the synergies between the theoretical analysis in this Part and the legal analysis in Part I, we have, in this chapter begun to shift towards a conceptual clarification of exploitation; as it might relate to labour exploitation. We categorised the process of exploitation into three stages: background, procedural, and substantive; and outlined the conditions that are required for each stage: imbalance of bargaining power, position of inequality, taking unfair advantage, nonessential defective consent, (mutual) benefit and detriment. These conditions of exploitation individually do not amount to exploitation. However, cumulatively they may be indicative of exploitation.

Thus, we begin to see the interconnected nature of the conditions of exploitation. They are not to be considered in isolation but cumulatively. Indeed, an imbalance of bargaining power alone does not amount to exploitation, the stronger party must act in such a way that the inequality is taken advantage of with a view to obtaining a benefit, at the expense of the weaker party, leading to an outcome which violates their human dignity.

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<sup>188</sup> Zwolinski discusses the plight of sweatshop workers to choose their profession, based on a need to survive. Zwolinski (Oct., 2007), *supra* n.88, p. 692 -696.

Finally, we recognise that a conceptualisation of exploitation must also be aware of the tolerance of exploitation, that does not seek to discard the moral wrong of exploitation, but rather overrides it in certain circumstances.

**PART III – Labour exploitation in the criminal law of Belgium and  
England & Wales**



## **CHAPTER 7 - Composition and contextualisation of the file study of labour exploitation in Belgium and England & Wales**

### **0. Introduction and structure of the chapter**

In the first part of this thesis, we demonstrate that the principal objective of the research – the understanding of exploitation in law – is, to date, a matter of legal study that has evoked conflicting responses. As already announced, the expository review and analysis of the state-of-the-art legal understanding of labour exploitation in Part I and the exploratory review of exploitation theory in Part II form the basis for the development and framing of the research design for the comparative file study in Belgium and England & Wales - the object of enquiry in this present part of the thesis.

In Section 1 of this chapter, we outline the analytical framework that provides a tool that can discern the understanding and handling of the law in practice in criminal cases of labour exploitation in Belgium and England & Wales. We present, in Section 2, the composition of the file study and in Section 3 we describe aspects of the file study in order to inform the comparative analysis in subsequent chapters. In Section 4, we will set the scene for the following chapters by discussing the role of the two principal actors who are responsible for ensuring a consistent and effective implementation of international and regional obligations into the domestic criminal legal framework: the legislature and the judiciary.

Belgium and England & Wales are both destination countries for victims of human trafficking.<sup>1</sup> Belgium is also increasingly considered as a transit country.<sup>2</sup> In addition to the transnational nature of the phenomenon, both countries have identified an increase in the number of nationals who are exploited in the labour market.<sup>3</sup> In Belgium exploitation is taking place in the following sectors: hospitality and construction, as well as cleaning services, horticulture and agriculture.<sup>4</sup> In England & Wales, the economic sectors identified as being at risk of exploitation, include those low-paid sectors such as domestic service, care, agriculture, cleaning, hospitality and construction.<sup>5</sup>

Year	Belgium <sup>6</sup>		England & Wales	
	No. of prosecutions <sup>7</sup>	No. of referrals <sup>8</sup>	No. of prosecutions <sup>9</sup>	No. of referrals <sup>10</sup>
2010	21	Not available	Not available	Not available
2011	52	165	Not available	Not available
2012	32	164	89	393
2013	46	184	79	820
2014	49	115	86	1093
2015	79	124	61	1605
2016	69	112	62	2034
2017	143	116	65	2840

<sup>1</sup> GRETA, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Belgium, First evaluation round*, Strasbourg, 25 September 2013, GRETA (2013) 14, p. 10.

<sup>2</sup> GRETA, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Belgium, Second evaluation round*, Strasbourg, 16 November 2017, GRETA (2017) 26, p.7.

<sup>3</sup> GRETA (2013), supra n.1, p. 10; GRETA (2017), supra n.2, p.7.

<sup>4</sup> See GRETA (2013), supra n.1, p. 10; GRETA (2017), supra n.2, p.7.

<sup>5</sup> GRETA, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom, First evaluation round*, Strasbourg, 12 September 2012, GRETA (2012) 6, p. 30 and p.83, GRETA, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom, Second evaluation round*, Strasbourg, 7 October 2016, GRETA (2016)1, p. 24.

<sup>6</sup> In Belgium, as there are no harmonised data sets, the following statistics are from the Police General National Database (GND) and the Social Inspectorate of the Federal Public Service of Social Security for all recorded human trafficking violations. Myria - Belgian Federal Migration Centre, *Rapport Annuel 2017 En ligne* (2017).

<sup>7</sup> Evolution of the number of cases referred to the prosecutor's office, including the federal office: For 2011 see Centre fédéral pour l'analyse des flux migratoires, la protection des droits fondamentaux des étrangers et la lutte contre la traite des êtres humains, *Rapport annuel traite et trafic des êtres humains 2011: L'argent qui compte* (2011), p.136; For 2012-2016: Myria (2017), supra n.6, p. 136; For 2018 see Myria - Belgian Federal Migration Centre, *Rapport annuel traite et trafic des êtres humains 2018: Mineurs en danger majeur* (2018), p. 142.

<sup>8</sup> Human trafficking victims referred to the NRM. For 2011 see Centre fédéral pour l'analyse des flux migratoires, la protection des droits fondamentaux des étrangers et la lutte contre la traite des êtres humains (2011), supra n.7, pp128-131; For 2012-2017 see Myria (2018), supra n.7, p. 137 & p. 139.

<sup>9</sup> For data on number of decisions to prosecute in England & Wales not including human trafficking for sexual exploitation from 2010-2011 see HM Government, *First annual report of the Inter-Departmental Ministerial Group on Human Trafficking* (2010-2011), p. 32; For 2012-2013 see HM Government, *Second report of the Inter-Departmental Ministerial Group on Human Trafficking* (2012-2013), p.26; For 2014-2016 see HM Government, *2017 UK Annual Report on Modern Slavery* (2017), p. 19; For 2017 see HM Government, *2018 UK Annual Report on Modern Slavery* (2018), p. 19; HL, *Short Debate: Immigration: Migrant Workers* 27 October 2009 Vol 713, Col 1152; HC, *Modern Slavery Bill, Second Reading*, 8 July 2014, Col 188.

<sup>10</sup> National Referral Mechanism Statistics referring to total number of adults and minors referred to NRM for labor exploitation and domestic servitude see National Crime Agency, *National referral mechanism statistics end of year summary 2013* (20 January 2014); National Crime Agency, *National referral mechanism statistics end of year summary 2015* (11 February 2016); National Crime Agency, *National referral mechanism statistics end of year summary 2016* (7 April 2017); National Crime Agency, *National referral mechanism statistics end of year summary 2017* (26 March 2018); National Crime Agency, *National referral mechanism statistics end of year summary 2018* (23 March 2019).



*Table 3: Number of referrals and prosecutions for labour exploitation offences in England & Wales and Belgium (2010-2017)*

The above table shows that both countries have a marked increase in the number of labour exploitation cases in terms of identified victims of trafficking and for them, in the case of England & Wales, forced labour, slavery and servitude. Nevertheless, the difference in prosecutions of criminal offences related to labour exploitation in the two case studies is stark in contrast.

## **1. Research design**

Building on the methodology outlined in the Introduction of the thesis, we will briefly present the analytical framework (see Annex 1 for full outline) which will be used for the data collection and analysis process (see Sections 2.2 & 2.3). The analytical framework for the comparative analysis of the file study has been developed following the expository review and analysis of the state-of-the-art legal understanding of labour exploitation in Part I and the exploratory review of exploitation theory in Part II.

The structure of the framework is premised upon the conditions of exploitation in Chapter 6, where we identified three stages of the exploitation process: background, procedural and substantive. The features of exploitation are then further developed in accordance with the findings from the analysis of the constituent elements of the definitions of labour exploitation in international and regional law as well as the features that have emerged from the legal analysis (Chapters 1- 4) and the typology of exploitation theory (Chapter 5). Overall, the analytical framework is reflective of the wide range of factors used by the judges to assist with their adjudication of cases.

The first section of the analytical framework refers to two **background conditions. The position of vulnerability and/or inequality (condition I) and imbalance of bargaining power (condition II)**. Here the focus is upon the *background circumstances* of the individual including any vulnerabilities that may place them in a weaker position. The factors that could indicate possible risk factors or vulnerabilities are developed from those that already exist in law and theory. These are then further

assessed in accordance with the status of the *relationship between the two parties*, whether pre-existing or not. These factors can assist with the determination of the imbalance of bargaining power between the two parties that arise from a position of inequality.

The second section of the analytical framework refers to two **procedural conditions. Taking unfair advantage (condition III) and consent (condition IV)**. Here the emphasis is on the *role of the exploiter* and their *attitude* towards the exploited party. In particular, we focus on the *means of control over person's capacity or resources*. The means are developed from the existing legal frameworks including the international human trafficking definition, the ILO forced labour indicators and other factors that emerged from the desktop research in Part I. The impact of this control is then considered from the perspective of the *(in)voluntariness* of the exploited party – a key feature that we have seen emerge in the legal definitions of exploitation and in the literature of exploitation theory. Here a number of different aspects are considered that reflect the diversity of the role of consent in an exploitative situation, and in particular the factors that could compel an individual to accept exploitative working conditions, such as a lack of alternative and lack of resources. Finally, the *living and working conditions* themselves are factual circumstances that are indicative of whether or not exploitation has occurred. Here again, we build upon the indicators that have been developed alongside the international and regional legal frameworks and case law.

The third section of the analytical framework considers the two final **substantive conditions, the (mutual) benefit (condition V) and detriment (condition VI)**. These conditions are reflective of the exploration of exploitation theory in literature whereby it emerges that both parties can accrue a benefit, even though it does not have to be realised and may only be a perceived *benefit*. For exploitation to have emerged, there must be a *detriment* to the exploited part that can amount to a number of different things, including harm, an affront to human dignity, lack of respect, degradation or even lack of sufficiency in that the basic needs of the exploited party are not met.

## 2. Composition of the file study

The adoption of an empirical approach to the law lends itself to a systematic gathering, describing and analysis of the criminalisation and judicial application of labour exploitation in the two comparative jurisdictions: i) Belgium and ii) England & Wales.

In Belgium, the analysis considers the **offence of trafficking for the purpose of economic exploitation** prohibited under Article 443quinquies Criminal Code and modified by the Law of 29 April 2013.

In England & Wales, the analysis focuses upon **trafficking people for labour exploitation**, introduced in Section 4 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 replaced by Section 2 Modern Slavery Act 2015. In addition, three standalone offences of **holding another person in slavery, holding another person in servitude** and **requiring another person to perform forced or compulsory labour**, first criminalised under Section 71 Coroners and Justice Act 2009 and replaced by Section 1 Modern Slavery Act 2015 will be considered.

In the remainder of this section we will provide insight into the sample of the file study including the timeframe and sample size (Section 2.1), the process of data collection and analysis (Sections 2.2 & 2.3) and the limitations of the file study (Section 2.4). In particular, whilst the criminal legal framework and its implementation is the principal focus, we acknowledge that there are alternative explanations for the differences in the approach to labour exploitation e.g. inquisitorial v common law – role of the judge etc that do not hinder the comparative approach but in fact offer insight into the real-world application of the law.<sup>11</sup>

### 2.1. Sample

A contextual approach requires investigation of sources beyond the black-letter law, however it is not feasible, based upon practical constraints such as time and resources,

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<sup>11</sup> Lawless, R.M., Robbennolt, J. K., & Ulen, T. S., (eds) *Empirical Methods in Law*, 2nd Edition, (Aspen Select Series, 2016), p.33.

to achieve a state of omniscience.<sup>12</sup> Therefore, by using a purposive sampling approach<sup>13</sup> - timeframe, types of offence on indictment and, in Belgium, language restrictions - the research considers the information recorded by the courts.<sup>14</sup> Whilst such an approach to the sampling has the benefit of being drawn from real world sources; limitations do arise regarding different levels of access to the data sources. For instance, in England & Wales, unlike Belgium, the judgments are not publicly available.

### 2.1.1. Timeframe

Recent law reform in both case studies generates an opportunity to discern the impact of the change in practice. However we acknowledge that such changes take time to implement and their effects may be slow to manifest themselves.<sup>15</sup> The sample considers criminal cases where the judgment was handed down between January 2010 and December 2017. Crucially, the selected timeframe is representative, in both jurisdictions, of domestic legal reforms to the criminalisation of labour exploitation. In Belgium, significant amendments were made to the Criminal Code in the Law of 29 April 2013, that sought to provide clarification to the meaning and scope of overall trafficking offence, but also for trafficking for economic exploitation (see Chapter 8).<sup>16</sup> In England & Wales, two reforms are of significance, first in 2010 with the entry into force of standalone offences and again in 2015 with the consolidation of the criminal law offences prohibiting labour exploitation (see Chapter 8).<sup>17</sup>

The choice of the timeframe provides a state-of-the-art overview of the implementation of the criminalisation of labour exploitation, in both legal settings.

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<sup>12</sup> Palmer, V. V., 'From Leretholi to Lando: Some Examples of Comparative Law Methodology', (2005) *American Journal of Comparative Law* 53, 261, p288.

<sup>13</sup> Selected by the researcher as being particularly informative.

<sup>14</sup> Lawless et al (2016), supra n.11, p.56.

<sup>15</sup> Lawless et al (2016), supra n.11, p.35.

<sup>16</sup> Huberts, C., & Minet, J.-F., 'La loi du 29 avril 2013 visant à modifier l'article 433quinquies du Code pénal en vue de clarifier et d'étendre la définition de la traite des êtres humains: analyse et mise en perspective' (2014) *Revue de Droit Pénal de de Criminologie*, 34, p. 6.

<sup>17</sup> The Coroners and Justice Act 2009 (Commencement No. 4, Transitional and Saving Provisions) Order 2010; The Modern Slavery Act 2015 (Commencement No. 1, Saving and Transitional Provisions) Regulations 2015.

### 2.1.2. Sample size

A total of 72 cases are analysed: 25 in England & Wales and 47 in Belgium (see Annex 2 for a full list of the cases). As can be seen from Table 1 found in the introduction of this Chapter, the sample does not comprise all cases of labour exploitation in the timeframe. The identification of the sample was a twofold process. We first undertook a mapping exercise to identify criminal cases where the first instance proceedings had completed between January 2010 and December 2017; and where at least one of the relevant offences was included in the indictment.<sup>18</sup> Following the mapping exercise, the final sample was selected according to relevance, accessibility, and linguistic skills of the researcher.

In England & Wales, since the cases are not reported and the transcripts of first instance cases are not publicly available, we identified in the mapping exercise 29 criminal cases where at least one of the criminal offences prohibiting labour exploitation were included in the indictment. The mapping exercise used LawPages to identify the case number of the first instance cases and Westlaw database to identify the appellate cases. In order to analyse these cases, we requested research access from Her Majesty's Courts and Tribunals Service to access all 29 cases. The request for research access to all 29 cases was submitted on 3 November 2017 and was granted on 27 April 2018 for a period of six months (30 April 2018 - 31 October 2018). The research access included 23 of the cases identified in the mapping exercise, as six files could not be found (UK2, UK10, UK11, UK13, UK18, UK26). Finally, the Ministry of Justice also made the researcher aware of two new cases where the trial had concluded towards the end of 2017 (UK30, UK31). The case files were accessed at the following Crown Courts: Bristol, Cardiff, Croydon, Harrow, Leeds, Luton, Manchester, Manchester Minshull Street, Newcastle, Nottingham, Oxford, Portsmouth, Preston, Southampton, Southwark, St Albans, and Woolwich. The content of the court files varied, but in most instances they included documents related to the preliminary hearing, submission of defence and prosecution counsel skeleton arguments and transcripts of interviews with defendants and complainants. A total of 25 cases were

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<sup>18</sup> A mapping exercise was undertaken for both jurisdictions, in order to ensure that the sample was as representative as possible: Mapping of labour exploitation criminal cases in Belgium (2010-2017), February 2018 and Mapping of labour exploitation criminal cases in England & Wales (2010-2017), March 2018 (on file with author).

analysed, however it is important to note that following access to the UK29 file, it emerged that the case related to sexual exploitation and not labour exploitation.

In Belgium, we identified 94 cases in the mapping exercise, however due to linguistic restrictions, only cases from the francophone community were retained (47 in total). The judgments of these 47 cases are publicly available from the website of the National Rapporteur.<sup>19</sup>

Year	2010	2011	2012	2013	2014	2015	2016	2017	TOTAL
Belgium	6	3	3	10	7	11	5	2	47
England & Wales	0	1	4	4	1	4	4	7	25

*Table 4: List of cases analysed in Belgium and England & Wales between 2010-2017*

#### *Demographic of victims/civil parties*

In Belgium, the sample consists of 125 civil parties. In 19 cases, at least one of the civil parties was a representative organisation such as the Interfederal Migration Centre, the specialised human trafficking organisations or a trade union (24).<sup>20</sup> A total of 101 human trafficking victims were included as civil parties in the sample (73 male and 28 females, including 1 minor). In one case, a specialised centre providing support and assistance to victims of human trafficking stood as civil party on behalf of two child trafficking victims (BE42). The majority of civil parties are third country nationals (87), with 7 EU nationals and of the remainder, the country of origin is unknown (7). It is to be noted, that not all victims will request to be a civil party, so the total number of victims of human trafficking listed on the indictments is higher (227). The gender and nationality of all victims is not available. In England & Wales, the sample consists of a large number of victims, with 81 victims in England & Wales (9 females – including 1 minor and 72 males – including 1 minor). The majority of victims are either British nationals (39) or EU nationals (38). Four victims were third country nationals.

<sup>19</sup> Myria - Federal Centre for Migration, Jurisprudence, available at: <http://www.myria.be/fr/jurisprudence> [last accessed 21 June 2019]; Myria, Federal Centre for Migration, Annual Reports, available at: <http://www.myria.be/fr/publications/eyJyZXN1bHRfcGFnZSI6ImZyXC9wdWJsaWNhdGlvdnMiLCJyYXRIZ29yeTpnem91bmRzIjoiMjMxIiwicmVxdWlyZV9hbGwiOiJyYXRIZ29yeSJ9> [last accessed 21 June 2019].

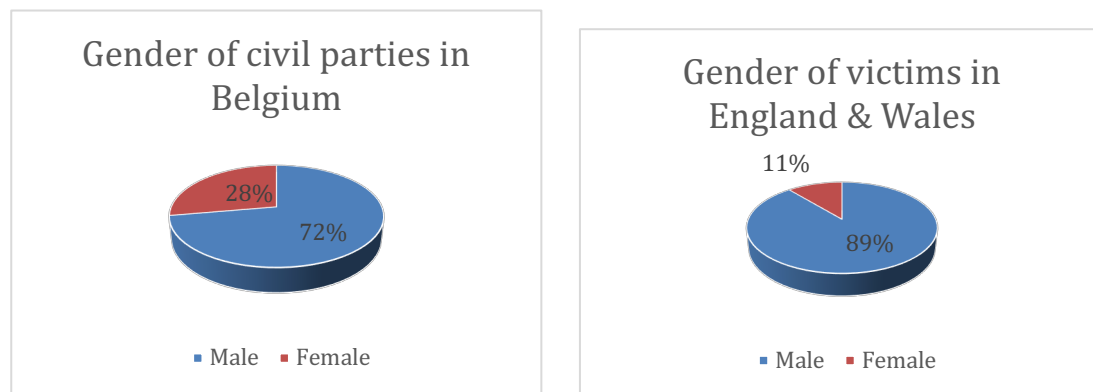
<sup>20</sup> BE01, BE03, BE07, BE09, BE10, BE15, BE17, BE19, BE20, BE23, BE26, BE29, BE32, BE36, BE42, BE43, BE44, BE45, BE47.

Nationality of victims/civil parties		
Belgium		
England & Wales		
EU Nationals		
Hungary		9
Latvia		2
Poland	1	22
Portugal	1	1
Romania	3	2
Slovakia	2	2
United Kingdom		39
Third Country Nationals		
Albania	1	
Algeria	1	
Bangladesh	1	
Brazil	9	
Bulgaria	3	
Democratic Republic of the Congo	1	
China	15	
Guinea	1	
India	4	
Indonesia	1	
Kenya	1	
Morocco	30	
Nigeria		1
Pakistan	1	2
Philippines	4	
Russia	1	
Tazmania		1
Togo	1	
Tunisia	2	
Turkey	2	
Yugoslavia	1	
Unknown	7	

**Table 5: Nationality of victims and civil parties in Belgium and England & Wales**

In relation to the background of those who are exploited, the file study offers a stark distinction. In England & Wales, the victims are predominantly British and EU

Nationals<sup>21</sup> and where third-country nationals are identified as victims, they have entered the UK through legal channels and had a regular residence status before and during the exploitative circumstances. In contrast, in Belgium, the majority of the victims are third country nationals with irregular migration status, which was also an observation made by the second evaluation of GRETA in Belgium.<sup>22</sup>



### *Demographic of defendants*

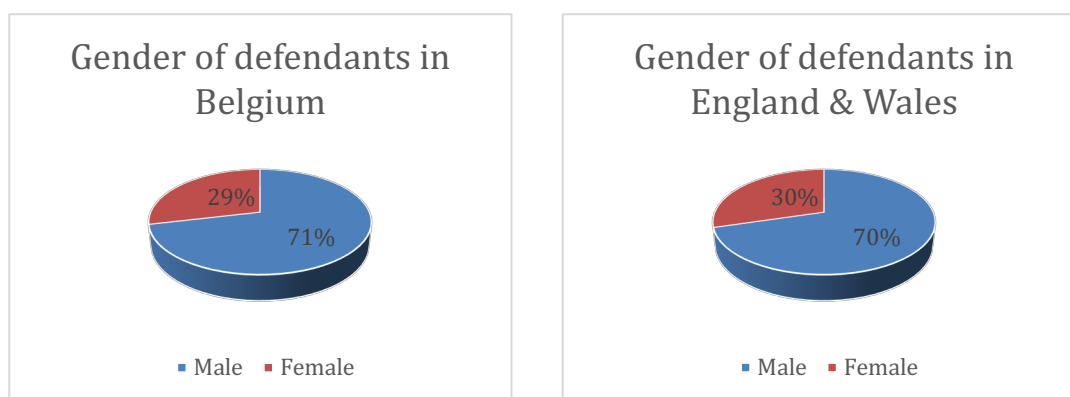
In Belgium, the sample consists of 139 defendants, of which 31 are legal entities and 108 are private persons (77 male and 31 female). The nationality of the defendants varies greatly, with 24 Belgian nationals (one with dual nationality Morocco/Belgium) 11 EU nationals (one with dual nationality DRC/Netherlands), 64 non-EU nationals (one with dual nationality – Morocco/Kenya) and two unknown. In 27 cases, the nationality of at least one of the defendants (42) corresponds to the nationality of at least one of the civil parties (51).<sup>23</sup>

<sup>21</sup> More generally the vast majority of undocumented migrants do not have access to the tribunal system, as bringing themselves to the attention of the authorities will lead to deportation.” Anderson, B., & Rogaly, B., *Forced Labour and Migration to the UK*, Compass, Trade union congress: 2005, p. 51.

<sup>22</sup> GRETA (2017), supra n.2, p.26. It is perhaps important to query the absence of trafficking victims who were regularly residing third country nationals in the Belgian sample could also be further investigated, especially since the recent FRA research reveals that 60% of the third country nationals were regularly staying in their country of work at the time of exploitation, the overrepresentation of irregularly staying third country nationals in the file study perhaps needs further exploration. A task that is nevertheless beyond the scope of the current research, see European Union Agency for Fundamental Rights, *Protecting migrant workers from exploitation in the EU: workers' perspectives* (June 2019), p. 26.

<sup>23</sup> BE04, BE05, BE07, BE08, BE09, BE10, BE11, BE14, BE15, BE19, BE20, BE23, BE24, BE26, BE27, BE28, BE29, BE31, BE32, BE33, BE34, BE35, BE36, BE38, BE39, BE43, BE44.





In England & Wales, the nationality of the defendants (81 in total, 57 male and 24 female) is also spread between 44 British nationals, 22 EU nationals and 14 third country nationals. For one defendant the nationality is unknown. In 20 cases, the nationality of the defendant (61) corresponded to the nationality of at least one of the victims (53).<sup>24</sup>

It is important to note that the number of defendants exceeds the number of cases, and the analysis is based upon each case rather than each defendant.

Nationality of defendants	Belgium	England & Wales
<b>EU Nationals</b>		
Belgium	24 (1 dual nationality Morocco)	
France	1	
Greece	1	
Hungary		4
Italy	3	
Latvia		
The Netherlands	1 (dual nationality DRC)	
Poland		11
Portugal	2	
Romania	2	4
Slovakia	1	3
United Kingdom	1	44
<b>Third Country Nationals</b>		
Albania		
Algeria	2	

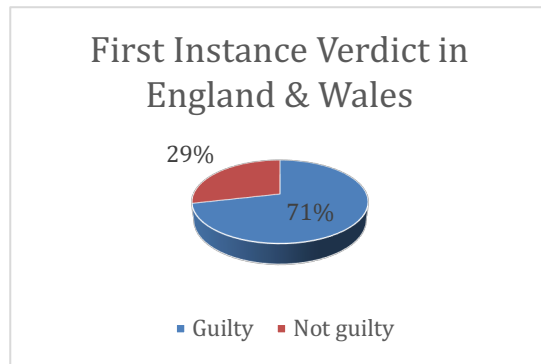
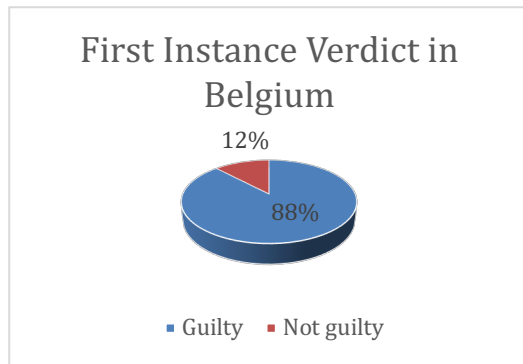
<sup>24</sup> UK1, UK3, UK4, UK5, UK6, UK9, UK12, UK15, UK16, UK17, UK20, UK21, UK22, UK23, UK24, UK25, UK27, UK28, UK31.

Bangladesh	1	
Brazil	3	
Bulgaria	1	
Democratic Republic of the Congo	1	
China	20	
Guinea		
India	1	
Indonesia	1	
Kenya		
Liberia	1	
Morocco	10	
Nigeria	1	2
Pakistan	2	11
Philippines		
Russia		
Syria	1	
Tazmania		1
Togo	1	
Tunisia	1	
Turkey	5	
United Arab Emirates	8	
Yugoslavia	2	
Zaire	1	
Unknown	2	1

***Table 6: Nationality of defendants in Belgium and England & Wales***

### *Outcome of proceedings*

In Belgium, the outcome of the criminal trials led to 94 defendants found guilty of human trafficking offence and 13 defendants found not guilty. Three defendants were subsequently acquitted on appeal. Of the 94 defendants, 93 were given a custodial sentence ranging from 9 months to six years, and one defendant was given 200 hours of community service. In many instances, the custodial sentences were accompanied by compensation order (41), a fine (42) and a restriction or confiscation order (20).



In England & Wales, the outcome of the criminal trials led to 55 defendants found guilty of human trafficking and/or standalone offences and 21 defendants found not guilty. Four defendants did not receive a verdict for various reasons including: the prosecution was not continued (2), there was no evidence offered (1) or the defendant was removed from the indictment (1). Of the 55 defendants found guilty, all were given custodial sentences (suspended in two instances) ranging from 11 months to 15.5 years. In many instances, the custodial sentences were accompanied by compensation and confiscation orders (27), serious crime prevention order/slavery, trafficking prevention orders (16) and a restraining order (1).

## 2.2. Data collection

In order to facilitate the analysis and comparison with other cases in both jurisdictions, we developed a pre-prepared coding template for the purpose of data collection (see Annex 3). The template draws heavily on the findings of both law and theory from Part I and II and is split into four main parts: the first part allows for collecting the procedural and factual elements of the case, the second part draws heavily from the analytical framework and focuses upon the judicial weight given to the factual circumstances in determining the exploitation according to the three stages developed from the typology of the exploitation theory: background, procedural and substantive. The third part takes into account any reference to existing legal standards (domestic or supranational) that is of significance to the judicial reasoning in the case in question. The fourth and final part allows for flexibility should any other factors emerge and have an impact on judicial reasoning.

The first version of the coding template was developed following the initial legal analysis in Part I and the analysis of exploitation in political theory in Part II, it was then updated following finalisation of the methodology and the development of the analytical framework. The coding template was then further revised and finalised after an initial phase of data collection in Belgium. The coding template ensures a systematised and standardised collection of the data which assists with the reliability and replicability of the coding stage. In addition, in order to minimise margin of error, interim steps such as data collection on paper and then insertion into the coding template, have been avoided.<sup>25</sup>

### **2.3. Data analysis**

The file study analysis uses two classic legal methods:

- i) *Qualitative content analysis of the case law in each domestic legal regime*

The first level of content analysis is premised upon the coding template that is derived from the analytical framework. The analysis allows for flexibility so that any key words that emerge from the data can be embedded. This first level of analysis determines the extent to which the law on the books has been successfully implemented in practice, and whether or not the judicial adjudication of the legal framework is in line with the drafters' intentions. In addition, the adoption of this approach also documents trends and factors in the case law that appear important to case outcomes. These in turn contribute to the process of conceptualising the legal understanding of exploitation and the conditions of exploitation (see Chapters 9 and 10).

Content analysis has its limitations, for instance, we cannot treat as accurate and complete the facts and reasons given in opinions and, it is not possible to predict the outcome of future cases, as other factors such as the personality of the judge as an individual must be taken into account. Nevertheless, such analysis can tell us how cases have developed and been argued, ultimately describing a more accurate landscape of how judges decide and explain their decisions. Whilst it is accepted that content analysis

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<sup>25</sup> Lawless et al (2016), *supra* n.11, pp.168-170.

‘reaches a thinner understanding of the law than that gained through more reflective and subjective interpretive methods,’<sup>26</sup> it is envisaged that, overall, such an approach will ‘increase internal validity by removing elements of researcher bias and improving thoroughness and accuracy.’<sup>27</sup>

ii) *Comparative legal analysis of the two domestic legal regimes*

The domestic case law data set forms the basis of the subsequent comparative legal analysis, which as highlighted in the introduction of this chapter, entails a qualitative comparative analysis of the national legal orders as to the domestic implementation of the international prohibition of labour exploitation, both in terms of formal and substantive law.<sup>28</sup>

In the first phase of comparative analysis we identify the judicial application of the ingredients of the offence in light of the law on the books, taking into account not only the judicial decisions but also other factors such as the development and drafting of the current law and policy, paying special notice to the political and societal influences that led to the final version of the law as it stands (see Chapter 8). Such a macro-comparison enables the spirit and style of different systems to be compared whilst also acknowledging the role of non-legal factors in the functioning of the law.

The second and third phase of the comparative analysis are closely interconnected. We identify, in phase two, the key elements on how exploitation is conceptualised by the judiciary, whilst in the final phase we operationalise the theoretical model of exploitation as a basis for identifying the key constituent elements of labour exploitation in law (see Chapter 9).

## 2.4. Limitations

A number of limitations are acknowledged.

Whilst the body of research in labour exploitation and in particular, human trafficking for labour exploitation is relatively small, we seek to contribute to the

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<sup>26</sup> Hall, M.A., & Wright, R. F., ‘Systematic Content Analysis of Judicial Opinions’, (2008) 96 *California Law Review* 63, 88, p.87.

<sup>27</sup> Hall et al (2008), *supra* n.26, p.88.

<sup>28</sup> Siems, M., *Comparative Law* (Cambridge: Cambridge University Press, 2018).

understanding of exploitation in law, by ‘shed[ding] light on legal questions in ways that lead to changes in legal practices or structures.’<sup>29</sup> However, we note that empirical research alone is not always the best approach. Thus, the archival research we conducted in Part III of the thesis, is complemented by the normative analysis of the phenomenon in law and theory in Part I and Part II.

The very nature of archival data sources may lead to a biased selection as it is inevitable that not all situations will be captured.<sup>30</sup> Indeed, when it comes to judicial decisions challenges exist as to the internal validity as it can be difficult to measure and control for all the factors that could reasonably influence the results.<sup>31</sup> Nevertheless, an examination of the judicial proceedings in decided cases and the identification of the relationships among them, has external validity as they capture the conditions in the real world. Furthermore, the challenges of purposive sampling in the context of archival data research can be offset by including processes for triangulation and ensuring that additional sources are consulted, including reports that assess and evaluate the effectiveness of the law and policy in practice.<sup>32</sup>

Finally, there is an imbalance of the availability of the information in the two jurisdictions. As mentioned, in Belgium the judgments are publicly available consisting of the indictment, factual circumstances and sentencing remarks. However, the access to the case files in England & Wales, in certain instances, provided information on preliminary hearings, defence and prosecution counsel skeleton arguments and transcripts of interviews with defendants and complainants. As a result, in certain places, the depth of analysis is much more elaborated due to access to these additional materials. Notwithstanding, the essence of the purpose of this analysis is available in both jurisdictions: to examine and determine the judicial interpretation of labour exploitation in criminal law.

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<sup>29</sup> Lawless et al (2016), supra n.11, p.17.

<sup>30</sup> Data might be biased: not all possible data were recorded (selective deposit), decisions about the maintenance of the data may mean that some data are retained and other data discarded (selective survival) Lawless et al (2016), supra n.11, p.127.

<sup>31</sup> Lawless et al (2016), supra n.11, p.46.

<sup>32</sup> For example, annual reports of national rapporteurs or equivalent mechanisms, independent reviews of legislation and implementation of policy, GRETA country reports etc.

### 3. Contextualisation of the file study

We will briefly outline in this Section certain contextual elements of the criminal cases accessed in the file study that are of importance when it comes to the analysis and discussion of exploitation in Chapters 8 and 9. These characteristics include the types of exploitation (Section 3.1), the networks and individuals involved as perpetrators (Section 3.2), the economic sectors wherein labour exploitation was uncovered (Section 3.3) and finally, the channels of identification and how such cases came to the attention of criminal justice authorities (Section 3.4).

#### 3.1. Type of exploitation

In Belgium, 46 cases refer to economic exploitation, with one case of exploitation of begging. In England & Wales, human trafficking is on the indictment in 11 cases.<sup>33</sup> Of the standalone offences, the most prominent form of exploitation on the indictments is forced labour, in 16 cases,<sup>34</sup> followed by servitude in 10 cases.<sup>35</sup> Slavery is not listed on the indictment as a standalone offence, but only as human trafficking for the purposes of slavery in two cases.<sup>36</sup>

Type of exploitation	Number of cases
Belgium	
Economic Exploitation	46
Forced begging	1
England & Wales	
Human trafficking	11
Forced or compulsory labour	16
Servitude	10
Slavery	0

*Table 7: Type of exploitation on indictment in Belgium and England & Wales*

<sup>33</sup> UK1, UK3, UK7, UK8, UK9, UK24, UK25, UK27, UK28, UK29, UK30.

<sup>34</sup> UK4, UK5, UK6, UK8, UK9, UK12, UK14, UK16, UK17, UK21, UK22, UK23, UK24, UK25, UK30, UK31. Note that UK8, UK9 involve sexual exploitation and UK25 forced prostitution.

<sup>35</sup> UK3, UK4, UK6, UK7, UK12, UK14, UK15, UK17, UK20, UK22.

<sup>36</sup> UK1, UK8 – human trafficking for slavery.

In England & Wales, three cases involved factual circumstances prior to 2010 and as a result the indictment only lists human trafficking for exploitation as the standalone offences had not yet entered into force.<sup>37</sup> Following 6 April 2010, where the complainant is an EU national or non-EU national, in six cases the indictment combined a count[s] of human trafficking with count[s] of one or more of the standalone offences.<sup>38</sup> Where the complainant is a UK national, 13 cases listed standalone offences only – except for one case (UK29) involving trafficking of a minor.<sup>39</sup> Post 2010, there are only two cases where human trafficking is the only labour exploitation offence listed on the indictment with no standalone offences.<sup>40</sup>

In both jurisdictions, the factual circumstances reveal other forms of exploitation that arguably go beyond the scope of labour exploitation as understood by the law on the books. For example, in England & Wales, forced criminality outside the context of human trafficking is also a prevalent feature of the labour exploitation, in particular commercial exploitation in four cases,<sup>41</sup> shoplifting in two cases (UK14 & UK31) and theft in one case (UK3).<sup>42</sup> In both jurisdictions, there is one instance where forced prostitution is successfully prosecuted as economic exploitation (BE46) or forced labour (UK25) and not human trafficking for the purpose of sexual exploitation. So far, at a regional level, only one recent case of *S.M. v Croatia* [2018] has referred to forced prostitution in relation to the Article 4 ECHR prohibited practices, however the Court explicitly avoided assigning a form of exploitation by stating that human trafficking was accepted as being under the material scope of the provision.<sup>43</sup> In addition, in the England & Wales file study, two more cases include sexual offences on

<sup>37</sup> UK1 – slavery and servitude, UK3 – servitude, UK9 – forced labour.

<sup>38</sup> UK7, UK24, UK25, UK27, UK28, UK31.

<sup>39</sup> UK4, UK5, UK6, UK12, UK14, UK15, UK16, UK17, UK20, UK21, UK22, UK23, UK30.

<sup>40</sup> In UK8 the legal directions of judge refer to slavery, servitude and subjected to force, threats, or deception designed to enable another person to acquire a benefit of any kind in context of forced marriage and sexual exploitation. In UK19 the legal directions of judge refer to the provision of services under deception. These are forms of exploitation listed under Section 1 of the Modern Slavery Act but not categorized as standalone offences, see further discussion on this issue in Chapter 9.

<sup>41</sup> UK21, UK22, UK27, UK30.

<sup>42</sup> In three cases, where there is a long history of exploitation, the victim has a criminal record and in some instances has served a custodial sentence [UK14, UK21, UK23]. In two cases there were parallel ongoing investigations for trading standard offences [UK21, UK27] however, due to the identification of the individual as a potential victim of labour exploitation, the prosecutions were withdrawn: see more below in Section 3.3.

<sup>43</sup> *S.M. v. Croatia* 19 July 2018, Application no. 60561/14, para 54. “the Court concludes that **trafficking itself as well as exploitation of prostitution**, within the meaning of Article 3(a) of the Palermo Protocol, Article 4(a) of the Anti-Trafficking Convention, Article 1 of the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others and the CEDAW (see paragraphs 27, 28, 31 and 33 above), **fall within the scope of Article 4 of the Convention** and will assess the present case under that provision.” The approach of the Court directly follows the judicial reasoning in *Rantsev* whereby the Court held that trafficking falls within the scope of Article 4 of the Convention. However, whilst *Rantsev* did refer to sexual exploitation and forced prostitution of artistes in cabarets, it is not explicitly mentioned by the court in the deliberations of the application of Article 4 of the Convention, see *Rantsev v. Cyprus and Russia*, 7 January 2010, Application No. 25965/04, paras 272-282.



the indictment but in parallel with the offence of human trafficking for labour exploitation (rape in context of arranged marriage human trafficking for exploitation (UK8); rape in context of domestic servitude (UK9)).

One emerging form of exploitation which is increasingly visible in the British caselaw is financial exploitation. Cases that contain an element of financial exploitation can be divided in two categories:

- i) cases where working conditions are not exploitative *per se* but instead, the wages are either paid directly to the exploiter or the bank accounts are controlled by the exploiter, leading to debt bondage and dependence upon the exploiter for subsistence needs (accommodation, food, transport etc.)<sup>44</sup> and;
- ii) cases where fraudulent misrepresentations are made in conjunction with another type of exploitation.<sup>45</sup>

In the first instance, the work consists of legitimate employment, where the workers are registered with an employment agency, receive wages and payslips and wages are deposited into bank accounts in the name of the workers. Agency work is prevalent in this handful of cases, where workers are taken to work in a number of sectors such as: distribution warehouses, waste management and recycling centres and food packaging factories. The file study reveals an inconsistent handling of such cases, whereby the exploitation is either dealt with as an integral part of the exploitation offence e.g. forced labour (UK28, UK31) and securing services etc by force, threats or deception (UK19) or in parallel to the exploitation offence as a fraud offence (UK24).

The second category of financial exploitation consists of fraudulent misrepresentations, such as fraudulent social security claims made in the name of the victim (tax credits, unemployment benefit, income support allowance, disability allowance etc.). Such behaviour is recognised on the indictment as fraud offences. Other examples of fraud include fraudulent mobile phone contracts, insurance policies, ownership of vehicles etc. In these cases, the financial and material proceeds from these fraudulent misrepresentations are confiscated by the exploiters and the exploited parties are often unaware of such fraudulent activity being conducted in their name.

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<sup>44</sup> UK7, UK19, UK24, UK27, UK28, UK31.

<sup>45</sup> UK5, UK9, UK12, UK14, UK17, UK23, UK30.

In Belgium, the file study includes fraud offences on the indictment, however, these predominantly refer to fraudulent business practices,<sup>46</sup> such as non-payment of taxes (BE20), money laundering (BE11, BE16) forgery of counterfeit money (BE46), abuse of trust (BE16) misrepresentation of status of workers (BE43), engaging in fraudulent work (BE24).<sup>47</sup> Social security misrepresentations are not prevalent as in most cases the illegal administrative situation of the victims means that they are not eligible to claim social security benefits and/or open bank accounts.

In England & Wales, the composition of the indictment has developed throughout the reference period. This development is twofold. First of all, in early cases, the charge sheet and indictment when sent to the Magistrates' Court did not always include labour exploitation criminal offences, instead in three cases these offences are added at a later stage as the prosecution progresses.<sup>48</sup> For example, in one case (UK16), the initial charge sheet upon arrest and when sent to trial included the offences of unlawful imprisonment and grievous bodily harm, however, the final indictment also included forced or compulsory labour. In contrast, later cases show that “modern slavery” offences are included from the moment of arrest suggesting an increased awareness amongst law enforcement (UK22). Secondly, and in connection with the first development, the number and range of offences listed on the final indictment has increased throughout the reference period. For example, in 2010, the indictment only listed a handful of offences, and in some cases only the offence of human trafficking. From 2015 onwards, the indictments increasingly list not only human trafficking and a standalone offence[s] (due to the introduction of new offences in 4 April 2010), but also offences against the person, offences against the public order (including fraud) and sexual offences. As a result of this development, the complexity of the cases has had a procedural impact. For instance, during the pre-trial hearings of three cases, counsel made an application for severance of the indictment: ‘A single trial would be extremely long and complex, and the factual issues would be difficult for a jury to disentangle’ (UK30 Case summary – 13 May 2016).<sup>49</sup>

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<sup>46</sup> BE16, BE20, BE43 – Fraud offences from the *code de société*; BE1, BE2, BE5, BE16, BE29, BE32, BE44 – Fraud offences from *articles 193, 196, 197 et 213 du code penal*.

<sup>47</sup> *Articles 1, 2, 5 et 8 de la loi du 6 juillet 1976 sur la répression du travail frauduleux à caractère commercial ou artisanal de s'être livré à un travail frauduleux ou d'avoir recours aux services d'un travailleur frauduleux.*

<sup>48</sup> UK8, UK9, UK16.

<sup>49</sup> UK23, UK25, UK30.

Keane explains that the introduction of the standalone offences sought to bolster existing offences where, in the absence of a trafficking element, ‘it allows prosecutors to present the full extent of the behaviour, rather than having to rely on general offences such as assault, false imprisonment or theft, which may not fully reflect the nature of the offending.’<sup>50</sup> In practice, however, it seems that since the introduction of standalone offences, the indictment includes both standalone offences and the criminal offences that were used by the prosecution prior to the introduction of the standalone offences.<sup>51</sup> This suggests, that prosecutors are increasingly employing the full range of offences at their disposal, by combining standalone offences, trafficking offence and other relevant criminal offences. Does this suggest that the previous preference for the use of human trafficking offences,<sup>52</sup> over and above standalone offences has been replaced with this new all-encompassing approach? In this regard, an interesting area of further study will be to analyse the cases that are flagged as being related to modern slavery, but not prosecuted as such – for instance national research reveals that in 2015, the Crown Prosecution Service management information shows 226 defendants were flagged for modern slavery of which 149 (66%) ultimately received convictions (though not necessarily for a modern slavery offence).<sup>53</sup>

In Belgium, the composition of the indictment is reflective of a well-developed body of caselaw, as recognised by regional monitoring bodies.<sup>54</sup> Overall, the approach is similar to that of England & Wales, whereby the indictment includes a variety of offences in recognition of the complexity of the factual circumstances (predominantly offences against the person and sexual offences). All cases include the offence of human trafficking, with one case of exploitation of begging (BE15), one case of exploitation of prostitution (BE46) and one case of exploitation of a minor (BE28). The majority of cases (42) include social criminal offences on the indictment, which is reflective of the anti-trafficking policy that has always placed an emphasis on the need

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<sup>50</sup> Keane, D., ‘Abolitionist in heart but not in action: slavery, servitude and the status of Article 4 ECHR in Irish law’, (2013) *Irish Jurist* 50, 166-198, p. 176-177.

<sup>51</sup> E.g. false imprisonment, blackmail and assault, as well as employment legislation relating to working hours, minimum wage and health and safety at work. Keane (2013), *supra* n.50, p. 176-177.

<sup>52</sup> Keane (2013), *supra* n.50, p. 176-177.

<sup>53</sup> HM Government, *2016 Report of the Inter Departmental Ministerial Group on Modern Slavery* (2016), p.19; Home Office, *A Typology of Modern Slavery Offences in the UK Research Report 93*, Christine Cooper, Olivia Hesketh, Nicola Ellis, Adam Fair (October 2017), p. 3.

<sup>54</sup> GRETA (2017), *supra* n.2.

to include an approach that is based on social law.<sup>55</sup> Other offences included offences against the person, fraud offences and sexual offences.

Type of offence	Belgium	England & Wales
Social criminal offences <sup>56</sup>	42 <sup>57</sup>	
Offences against the person	4 <sup>58</sup>	13 <sup>59</sup>
Sexual offences	3 <sup>60</sup>	3 <sup>61</sup>
Offences against public order		2
Offences against property		2 <sup>62</sup>
Fraud	11 <sup>63</sup>	7 <sup>64</sup>
Other offences e.g. drug related	1 <sup>65</sup>	2 <sup>66</sup>

**Table 8: Type of offences on the indictment in addition to labour exploitation offences**

### 3.2. The informal and formal labour market

In both jurisdictions, there is a distinction between the role of businesses according to their status: namely, between those operating in the shadow economy<sup>67</sup> and legitimate businesses. The former are often small businesses with few workers<sup>68</sup> run by individuals or small family units (who are listed on the indictment as defendants in the

<sup>55</sup> Vermeulen, G., *La politique belge en matière des traite des êtres humains: Etat des lieux, évaluation et options futures*, Fondation Roi Baudouin (2006), p.32.

<sup>56</sup> For discussion on the application of the law on non-payment of wages to all workers including those employed illegally see Service Public Fédéral Justice, Service de Politique Criminelle (Direction III – Droit pénal de la Direction générale Législation, Libertés et Droits fondamentaux – SPF Justice) *Governmental report on Combatting Human Trafficking: 2011 - 2012*, pp. 32-33.

<sup>57</sup> non-registration at social security, etc in 42 cases, non-payment of wages in 22 cases, the employment of undocumented or unauthorised workers in 36 cases, human smuggling in 11 cases (BE1, BE4, BE5, BE7, BE11, BE20, BE26, BE38, BE39, BE42, BE46), slum landlord in three cases (BE3, BE32, BE43), no insurance for accidents at work in three cases (BE40, BE41, BE44), criminal organisation in three cases (BE16, BE44, BE46).

<sup>58</sup> One death threat (BE7), one case of involuntary wounding (BE40) where there was a possible threat to life due to poor working conditions, two cases of degrading treatment (BE32 & BE47).

<sup>59</sup> UK3, UK4, UK7, UK8, UK9, UK12, UK 15, UK 16, UK 17, UK 20, UK21, UK 23, UK 25; including unlawful/false imprisonment (UK3, UK8, UK 9, UK 12) and kidnapping (UK21).

<sup>60</sup> one case of rape and assisted rape (BE24), engagement in prostitution (BE24), exploitation in prostitution (BE46).

<sup>61</sup> UK3, UK8, UK9.

<sup>62</sup> UK27, UK30.

<sup>63</sup> fraud in 10 cases (BE1, BE2, BE5, BE16, BE20, BE29, BE32, BE43, BE44, BE46), money laundering (BE11, BE16), forgery in one case (BE46).

<sup>64</sup> Fraud to obtain benefit (UK6, UK17, UK23, UK24, UK31) cause false information to be produced/furnished (UK6), blackmail (UK23) money laundering (UK27), making false representation (UK30).

<sup>65</sup> Drug related offences (BE46).

<sup>66</sup> Unlawful neglect of a minor and facilitation of entry of non-Eu citizen into EU member state [change of name and included on passport as adopted son] (UK15).

<sup>67</sup> This finding corresponds to other research findings, see for instance Berntsen, L., & De Lange, T., ‘Employer sanctions: Instrument of labour market regulation, migration control and worker protection?’, in Rijken, C., & De Lange, T., (eds) *Towards a decent labour market for low waged migrant workers*, (Amsterdam University Press, 2018), p. 216; Radeva Berket, M., *Labour exploitation and trafficking for labour exploitation—trends and challenges for policy-making*, ERA Forum (2015) 16, 359–377p. 367.

<sup>68</sup> For further examples of involvement of small business see Berntsen & De Lange (2018), supra n.67, p. 219; Smit, M., ‘Trafficking in human beings for labour exploitation. The case of the Netherlands’, (2011) *Trends in Organised Crime* 14,184–197, p. 192.

case).<sup>69</sup> For the latter, where work is conducted in the legitimate labour market, the businesses do not facilitate the exploitation and subsequently are either not involved in the prosecution at all (England & Wales)<sup>70</sup> or are acquitted by the court as they are not to be held to bear individual criminal responsibility (in four cases in Belgium).<sup>71</sup> In one case, in England & Wales, a business owner was successfully prosecuted for his role in the exploitation of Hungarian workers. He was found to be complicit in the operation as he had knowingly hidden the use of the workers by keeping them off the books that were monitored by ethical auditors from his suppliers (UK19). Overall, considering the emphasis on the responsibility of businesses to ensure that their supply chains are free from exploitation, the choice of business model and the conditions of its implementation requires further consideration e.g. fast food franchises and sub-contracting for cleaning, use of employment agencies for temporary work. In BE6 and BE45, the court explicitly paid heed to the sub-contracting business model and the low contract values which were integral to the unacceptable low wages offered to workers and the deliberate recruitment of irregular workers.

*In the cleaning sector of fast food restaurants. These restaurants make two small cleaning companies compete for a maintenance contract. The cleaning staff must work for free one month before the company obtains the contract. This is one of the reasons leading the cleaning company to illegally outsource undocumented third-country nationals.*<sup>72</sup>

Whilst we have highlighted the role of networks, the courts recognise that it is not necessary for a large criminal network for human trafficking to take place, but can also involve individuals working on their own account:<sup>73</sup>

<sup>69</sup> Nb in both jurisdictions individuals are prosecuted, the businesses themselves as legal entities are not held criminally liable. In BE, businesses were included on the indictment are acquitted: BE29, BE31, BE44, BE45.

<sup>70</sup> UK24, UK27, UK28, UK31.

<sup>71</sup> BE29, BE31, BE44, BE45.

For discussion on application of corporate liability and Carestel case see Myria - Belgian Federal Migration Centre, *Rapport annuel traite et trafic des êtres humains 2015 : Resserrer les maillons* (2015), p. 116; Myria - Belgian Federal Migration Centre, *Rapport Annuel 2016, Traite et trafic des êtres humains: Des mendiants aux mains de trafiquants* (2016), p.146 & p. 153 GRETA (2013), supra n.1, p.53; Radeva Berket (2015), supra n.67, p. 371; GRETA (2017), supra n.2, p. 39.

<sup>72</sup> Centre fédéral pour l'analyse des flux migratoires, la protection des droits fondamentaux des étrangers et la lutte contre la traite des êtres humains, *Rapport annuel 2013 du Rapporteur indépendant Traite des êtres humains Belgique* (2013), p. 20, citing trend identified by the CTIF, Livre blanc sur l'argent noir, 20 ans de lutte contre le blanchiment et le financement du terrorisme, 2013. Unofficial translation, original: "dans le secteur du nettoyage des restaurants fast-food. Ces restaurants font jouer la concurrence entre deux petites sociétés de nettoyage pour un contrat d'entretien. Le personnel doit travailler gratuitement un mois avant que la société n'obtienne le contrat. C'est une des raisons qui mène l'entreprise de nettoyage à employer illégalement en sous-traitance des ressortissants de pays tiers sans papiers."

<sup>73</sup> Recognition of this also in the Plan d'action Lutte contre la traite des êtres humains 2015-2019, p.8. See also, Economic human trafficking is hidden and operates in "micro-structures" rather than in large rings see Service Public Fédéral Justice (2011 – 2012), supra n.54, p.40.

*The offence of trafficking in human beings may be committed by a person acting alone and on his own account, that is, without necessarily being part of an organized crime ring or being the last link in it.*<sup>74</sup>

Organised crime networks are identified in the sample of both jurisdictions; however, these are not large scale, multi-national networks (see for example BE cases with criminal organisation offences, and UK cases with conspiracy offences).<sup>75</sup> Indeed, the majority are small networks closely connected by family ties, or close acquaintances e.g. brothers (UK24), husband and wife (UK31), (extended) family in eight cases.<sup>76</sup> Such prevalence of small, familial networks, appears to debunk the internationally recognised view that human trafficking is an internationally organised crime on a par with the international drugs and arms trade, as noted by the Court of Appeal:

*We think it probable that victims of these offences will routinely be strangers rather than family members. In cases of facilitating illegal entry to the United Kingdom, the fact the entrant is a family member and not a stranger may constitute some mitigation of the seriousness of the offence. The fact the victim of economic exploitation is a stranger is not, we consider, an aggravating feature of the basic offence.*<sup>77</sup>

*This is not the case (as is often the case) of a substantial international forced labour criminal enterprise with many lieutenants).*<sup>78</sup> [emphasis added]

However, the limited involvement of large organised criminal networks could be a particular feature of labour exploitation whereas there is evidence to suggest that other forms of exploitation, such as human trafficking for the purpose of sexual exploitation and in particular of children, do occur in a broader context of internationally organised crime.

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<sup>74</sup> BE6 - Unofficial translation, original: “l’infraction de traite des êtres humains peut être le fait d’une personne agissant seule et pour son propre compte, c’est-à-dire sans qu’elle fasse nécessairement partie d’une filière criminelle organisée ou en soit le dernier maillon.”

<sup>75</sup> UK4, UK5, UK9, UK12, UK14, UK17, UK19, UK20, UK23, UK24, UK27, UK30.

<sup>76</sup> UK3, UK4, UK5, UK6 UK12, UK21, UK30, UK31. Research conducted by the EU Fundamental Rights Agency with severely exploited workers found that more than half of the persons interviewed had been recruited through personal networks, e.g. through friends, acquaintances, family members and, to a lesser extent, former employers, often people with the same ethnic background, to find jobs where they ended up being exploited FRA (2019), supra n.22, p.31 & p.33.

<sup>77</sup> *R v Attorney General’s Reference Nos. 37, 38 and 65 of 2010 (Shahnawaz Ali Khan, Raza Ali Khan and Perveen Khan)* [2010] EWCA Crim 2880, para 17.

<sup>78</sup> UK28 defence statement.

In most instances, the nationality of the worker matches or is closely connected to that of the exploiter.<sup>79</sup> Furthermore, in BE10, the court made explicit reference to the same nationality of the defendant and victims, leading to abuse of vulnerability, and dependence on exploiter.<sup>80</sup> Another indicator of the closely connected nature of the relationship between the exploiter and the victim is that the recruitment appears to take place via established community or family links.<sup>81</sup> In some milieus, there is an indication that the network is extensive, see for instance, Irish Traveller and Roma networks in the UK and the Chinese community in Belgium.<sup>82</sup> In England & Wales, the file study highlighted a significant number of cases referring to Irish travellers and Roma,<sup>83</sup> this also emerged from a file study of labour inspector cases in the Netherlands.<sup>84</sup> Similarly, as with the Dutch labour inspector file study, we are not suggesting that, in the present file study, there is a targeting of ethnic groups. However, the factual circumstances of these cases reveals that this milieu is already known to law enforcement due to prior criminality e.g. commercial exploitation, and by virtue of ongoing or concurring investigations may assist the detection of labour exploitation related offences.<sup>85</sup>

In both jurisdictions, the role of the network is very much focused upon the facilitation of entry into the country and the identification of work. However, a notable distinction between the two jurisdictions, is the legal recognition given to this conduct: in England & Wales, the facilitation of travel is indicted as human trafficking and not smuggling as it very often refers to persons who have the legal right to enter the country (EU nationals with freedom of movement or third country nationals with valid visa documents), whereas the facilitation of illegal entry into Belgium is recognised on the indictment as an alleged violation of the smuggling offence, for instance in one case (BE1), the indictment was amended to refer only to third country national civil parties and not the Polish civil parties.

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<sup>79</sup> Third country nationals in UK1, UK8, UK9, UK15, UK20; EU nationals in UK3, UK7, UK19, UK24, UK25, UK27, UK28, UK31, BE1, BE2, BE32, BE33; Third country nationals same nationality as exploiter BE04, BE05, BE7, BE9, BE11, BE14, BE17, BE19, BE23, BE24, BE26, BE28, BE29, BE33, BE35, BE35, BE36, BE39, BE24.

<sup>80</sup> See also reference to nationality of employer matching nationality of worker in Berntsen & De Lange (2018), *supra* n.67, p. 219.

<sup>81</sup> UK1, UK7, UK8, UK9, UK15, UK16, UK19, UK20, UK24, UK25, UK27, UK28

<sup>82</sup> Smuggling network in BE11; Perpetrator was previously smuggling and human trafficking victim in BE9, two perpetrators had links to smuggling network in BE20, Family network extended to Chinese community in BE26.

<sup>83</sup> Roma involvement in UK7, UK19, UK24, UK25, UK27, UK28, UK31; Irish traveler community involvement in UK4, UK5, UK6, UK12, UK14, UK17, UK21, UK23, UK29, UK30.

<sup>84</sup> Berntsen & De Lange (2018), *supra* n.67, p. 220.

<sup>85</sup> But also other concurring investigations, e.g. trading standards, etc.

### 3.3. Sectors of exploitation

A number of economic sectors are prevalent in both jurisdictions: namely, construction,<sup>86</sup> domestic work and or the provision of care in a private setting (a private household with no family relationship;<sup>87</sup> a private household arranged via a familial link;<sup>88</sup> provision of care (BE14 & BE23), domestic work/servitude,<sup>89</sup> forced marriage-BE28) and small to medium businesses such as bakeries, night shops, printers and butchers.<sup>90</sup> Other sectors in Belgium include restaurants,<sup>91</sup> transport (BE44), agriculture,<sup>92</sup> warehouse (BE41), wholesale garments (BE10), cleaning in fast food (BE6, BE45), horse stables.<sup>93</sup> One case of forced prostitution (BE46) and one case of forced begging (BE15). In England & Wales, with the emergence of financial exploitation as we discussed in Section 3.1, workers are employed in low-wage, low-skilled sectors such as distribution warehouses, food packaging, recycling plants and other work placements arranged by employment agencies.<sup>94</sup>

In England & Wales, there is a disparity between the types of exploitation that are found to reach the trial stage compared to the reporting in the media and by agencies such as the Gangmasters Labour Abuse Authority,<sup>95</sup> of arrests, raids and investigations in other sectors such as nail bars, cannabis farms, domestic workers in diplomatic households. In the context of domestic servitude, despite significant emphasis on domestic workers in diplomatic households, there are disparities in the number of referrals of human trafficking for the purpose of domestic servitude in private households, which suggests that migrant workers are finding it difficult to report, increasing their vulnerability to exploitation.<sup>96</sup> However, alternative mechanisms to criminal prosecution are being used, with complainants seeking resolution in an

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<sup>86</sup> BE1, BE2, BE3, BE5, BE7, BE8, BE12, BE19, BE20, BE27, BE29, BE40, BE43; UK4, UK5, UK6, UK14, UK21, UK22, UK30.

<sup>87</sup> UK1, UK3, UK15, UK16.

<sup>88</sup> UK8, UK9, UK20.

<sup>89</sup> BE32, BE35, BE47.

<sup>90</sup> BE13, BE17, BE22, BE25, BE30, BE33, BE38, BE42.

<sup>91</sup> BE4, BE9, BE11, BE24, BE26, BE39.

<sup>92</sup> BE21, BE31, BE37.

<sup>93</sup> BE16, BE18, BE34.

<sup>94</sup> UK19, UK24, UK27, UK28, UK31.

<sup>95</sup> A Non-Departmental Public Body (NDPB) that implements, monitors and enforces a license scheme for employment agencies, labour providers or gangmasters who provides workers to the following economic sectors: agriculture, horticulture, shellfish gathering and any associated processing and packaging. More information available at <http://www.gla.gov.uk/>.

<sup>96</sup> GRETA Noted the disparity between reporting of THB for purpose of domestic servitude in diplomatic household compared to private households: between 1 April 2009 and 3 May 2012, there were five diplomatic domestic workers conclusively identified as victims of trafficking (out of 15 referrals), compared to 21 private household cases (out of 67 referrals); GRETA(2012), *supra* n.5, p.31



employment tribunal for back pay of wages via compensation.<sup>97</sup> However, it is often difficult to enforce the ruling of the tribunals, leaving complainants without the compensation orders being complied with.<sup>98</sup> The role of Employment Tribunals in identification of serious criminal conduct has been brought to the attention of the Modern Slavery Unit.<sup>99</sup>

Other “at-risk” sectors have been heavily mediatised such as car washes and nail bars do not present themselves in the file study sample. However, there are challenges in finding evidence of forced labour in nail bars and car washes as these businesses are often the front for other illicit business e.g. drug related offences, money laundering, immigration crime and other organized crime etc.<sup>100</sup> As for nail bars, there is a difficulty in pursuing “victimless prosecutions”, making it difficult for prosecuting authorities to convince the judiciary to proceed as they consider that there is no case to answer. In 2018, a successful prosecution saw three defendants convicted of modern slavery offences, two were found guilty of facilitating the trafficking of the victims across the country to work in nail bars and one was found guilty of forced labour.<sup>101</sup> Nevertheless, the pursuit of “victimless” prosecutions is beginning to emerge (either because there is sufficient evidence without their testimony, or the victims are not identified).<sup>102</sup> To this end, the prosecution service can play a role in pursuing victimless prosecutions, through providing early investigative advice to law enforcement. Prosecutors can advise on possible avenues of enquiry and consider what independent evidence is needed to prove the offence without victim testimony.<sup>103</sup>

### 3.4. Identification of exploitation victims

It is important to emphasise that in both jurisdictions self-reporting is the predominant channels of victim identification. In England & Wales in particular, the increased awareness of modern slavery in the media was noticeable with one victim self-reporting

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<sup>97</sup> See BE35 involving diplomatic personnel. The Anti Trafficking Monitoring Group, *Before the Harm is Done Examining the UK's response to the prevention of trafficking*, (September 2018), p. 38.

<sup>98</sup> The Anti Trafficking monitoring group (2018), supra n. 97, p. 38.

<sup>99</sup> Information provided to researcher by representative of Crown Prosecution Service.

<sup>100</sup> Information provided to researcher by representative of Crown Prosecution Service.

<sup>101</sup> Crown Prosecution Service, *Gang jailed for human trafficking at nail salon*, 2 January 2018, available at: <https://www.cps.gov.uk/west-midlands/news/gang-jailed-human-trafficking-nail-salon> [last accessed 21 June 2019].

<sup>102</sup> HM Government, *Independent Review of the Modern Slavery Act, Fourth interim report: Legal application of the Modern Slavery Act* (21 March 2019), p. 14.

<sup>103</sup> Information provided to researcher by representative of Crown Prosecution Service.

to a victim support organisation following a radio advertisement (UK15). Secondly the role of the authorities such as law enforcement and labour inspectorate is very prominent. Such enforcement actions taken by authorities are very much premised upon risk assessment of the sector and /or intelligence gathering initiatives.<sup>104</sup> A promising practice also emerged in one case where a business reported their suspicion of exploitation (UK28). Although the company was not involved in the use of cheap labour, the company's awareness of exploitation and rogue labour providers led to the identification of the victims as being exploited. Other professionals who have identified victims of exploitation include health professionals (UK1, BE40), a probation officer (UK6) and a trading standards officer (UK21).

Identification channel	Belgium	England & wales
Labour inspectorate	5	0
Police control/raid	6	7
Self-reported	10	10
Third party report	2	2 <sup>105</sup>
Specialised centre/ victim support organisations	5	0
Other	3 <sup>106</sup>	5
Data not available	12	0

**Table 9: Channels of identification of potential victims of labour exploitation**

#### **4. The role of the legislature and the judiciary in the domestic criminal prohibition of labour exploitation**

Belgium and England & Wales are both bound by the international and regional instruments discussed in Chapters 1 - 4 wherein State parties are legally obliged to prohibit labour exploitation.<sup>107</sup> As a result, both jurisdictions emphasise compliance

<sup>104</sup> Berntsen & De Lange (2018), supra n.67, p. 216; See reference to risk assessment/intelligence led operations in FRA, *Protecting migrant workers from exploitation in the EU: boosting workplace inspections*, September 2018, p. 13; Service Public Fédéral Justice (2011 – 2012), supra n.54, pp27-28, pp31-32.

<sup>105</sup> Business reported suspected exploitation: UK28- Although the company was not involved in the use of cheap labour, the company's awareness of exploitation and rogue labour providers led to the identification of the victims as being exploited. E.g. their wages withheld. Contact with GLA and involvement in Stronger together – posters on site of the risks of exploitation.

<sup>106</sup> BE14, BE23 (anonymous), BE40 (hospital)

<sup>107</sup> UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime 2000 was ratified by in England & Wales in February 2006 and in Belgium in August 2004.

with international and regional obligations as the principal objective of domestic legal reform. Interestingly, however, the specific supranational instruments that triggered domestic legal reform differ: with Belgium seeking to transpose EU Directive 2011/36/EU (BE26)<sup>108</sup> and the UK seeking compliance with the Palermo Protocol and the European Convention on Human Rights (UK12).<sup>109</sup>

Similarly, the extent to which these supranational sources are relied upon when determining the scope of the domestic criminal law also differs. For instance, in Belgium, the legislature has provided a detailed explanation and definition of the national law in the preparatory works of the domestic legislation, which is then further developed by the courts (see more in Sections 1- 2 of Chapter 8 and Chapter 9). In England & Wales, whilst statute is one of the principal sources of law in the common law tradition, there are no statutory definitions of the labour exploitation offences. Instead, there is an explicit reference to supranational instruments whereby all those involved in the criminal proceedings (police, prosecutors and judges) ‘need to have regard to existing case law on Article 4 ECHR and international conventions.’<sup>110</sup> For a more general interpretation of the statute, the courts may refer to the pre-legislative documents to determine the intention of parliament before the statute came into law, and how the statute should be used and interpreted.<sup>111</sup>

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At the time of writing, both countries have ratified ILO Conventions No. 29, No.105 and No. 182, ILO Protocol and Recommendation 2014, Council of Europe Anti-trafficking Convention, Directive 2011/36/EU. However, it is important to note that ‘the UK was not initially bound by the EU Directive 2011/36/EU due to the fact that pursuant to the rules agreed in the 2007 Lisbon Treaty, the UK can keep a number of exemptions (or “opt-outs”) secured since the 1992 Maastricht Treaty, including measures in the area of justice and home affairs, while allowing for the possibility to “opt in” on a case by-case basis. In July 2011, the UK authorities notified to the European Commission (EC) of their intention to be bound by Directive 2011/36/EU and on 14 October 2011, the EC issued a decision according to which this Directive will apply in the UK.’ See GRETA (2012), supra n.5 para 14.

Only Belgium has transposed, in 2013, the Employers Sanctions Directive, Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168, 30.6.2009, p. 24–32.

Both countries have adopted the Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims; Directive 2012/29/EU of the European Parliament and of the Council of the European Union of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.

Only Belgium has adopted the Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

<sup>108</sup> Rapport fait au nom de la Commission de l’Intérieur et des Affaires administratives, de M. CLAES, 4 mai 2010 (Doc. parl., Sénat, n° 4-1631/1); Rapport fait au nom du Groupe de travail traite des êtres humains, de Mme DÉsir, 27 mars 2012, (Doc. parl., Sénat, n° 5-1073/1).

<sup>109</sup> For more details on the the UK’s lack of domestic legal reform following the adoption of the EU Directive, see Parkes, C., ‘The trafficking protocol has advanced the global movement against human exploitation: the case of the United Kingdom’, (2015) *Anti-Trafficking Review*, issue 4, 150-155, p. 150; and Craig, G., Balch, A., Lewis, H., & Waite, L., (eds) *Modern slavery agenda: Policy, politics and practices in the UK*, (Policy Press, 2019), p. 11-12.

<sup>110</sup> See reference to Article 4 ECHR, Convention on Action against Trafficking and Palermo Protocol in Modern Slavery Act 2015 (c.30) Explanatory Notes.

<sup>111</sup> Bowen, P., ‘Prosecution of cases of human trafficking in a common law system’, in Piotrowicz, R., Rijken, C., & Uhl, B. H., (eds) *Routledge Handbook of Human Trafficking*, (Routledge, 2017), p.223.

Taking into account the purpose of the legislation, the file study has affirmed that substantively the aim of the legal framework is explicitly acknowledged. The case analysis reveals that the judges in both jurisdictions not only seek to consider the will of parliament but also recognise that the principal purpose of the development of the national legislation is the application of regional provisions.<sup>112</sup>

In England & Wales, the judiciary are explicit in the need to ensure that the criminalised behaviour is sufficiently dealt with in accordance with the will of parliament (UK17, UK24). Similarly, judges also refer to the legislative's aim of ensuring that labour exploitation that occurs outside the scope of human trafficking is also criminalised, as demonstrated by the Court of Appeal's ruling in *R v Connors* [2013] EWCA Crim 324 (UK5):

*The Asylum and Immigration Act 2004 criminalised the exploitation of labour when it was connected to trafficking in human beings, but not otherwise. Therefore, it did not prevent vulnerable but untrafficked individuals from being subjected to forced or compulsory labour. The Gang Masters' Licensing Act 2004 established a system for licensing those who employed workers in specified industries. Nevertheless, this legislation, too did not address the entire problem. The end result was that many men and women continued to remain vulnerable to exploitation without any counterbalancing protection against exploitation.*

*Section 71 of the Coroners and Justice Act 2009 closed this vulnerability gap by creating an offence capable of being committed in three different ways. This new offence does not require that the victim should have been trafficked and does not address or create a new offence relating to immigration crime.*<sup>113</sup>

Similarly, the courts acknowledge the 'legal novelty' (UK5) of this area of law when it comes to the understanding of the offences.<sup>114</sup> In doing so, the courts, in light of the lack of domestic precedent, draw heavily upon the case law of the European Court of Human Rights for the definition of slavery, servitude and forced or compulsory

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<sup>112</sup> Will of parliament referred to in BE14, BE26, BE32, BE35, BE35, BE47. In UK12, the court referenced the intention of parliament being to protect vulnerable people from exploitation; Regional provisions: Article 4 ECHR, Palermo Protocol cited in *AG Ref Nos. 37, 38 and 65 of 2010* [2010] EWCA Crim 2880, para.12. EU Directive cited in BE26.

<sup>113</sup> *R v Connors* [2013] EWCA Crim 324, paras 5-6 (UK5).

<sup>114</sup> Note that the file study also revealed the jury requesting clarification of the scope of the offences on the indictment as they were unfamiliar with them [UK7].

labour and the regional and international law for the definition of human trafficking.<sup>115</sup> In addition, the file study reveals that there is significant reference to domestic authority, including appellate and first instance case law,<sup>116</sup> legal texts<sup>117</sup> and ministerial guidance,<sup>118</sup> which, in turn, draws heavily upon the interpretation of the regional provisions.

In stark contrast, Belgian judges do not make any reference to international or European law or jurisprudence – except for one brief reference to the ILO Forced Labour Indicators to interpret the meaning of “conditions contrary to human dignity.”<sup>119</sup> Overall, the principal sources of legal authority when interpreting the scope of the offence comes from the parliamentary *travaux préparatoires* of the original law, subsequent legal reform<sup>120</sup> and academic scholarship.<sup>121</sup> Only on two occasions, following the law reform in 2013, did judges refer to the application of the principle of human dignity in the domestic law in order to take into account the wide-ranging situations that were required to be prohibited in accordance with international and EU law:

*The legislative used the concept of human dignity in relation to trafficking in human beings, as s/he had to meet the requirements of European and international law, which included the punishment of a wider variety of situations.*<sup>122</sup>

<sup>115</sup> *Siliadin v. France*, 26 July 2005, Application No. 73316/01 in UK1, UK4, UK5, UK6, UK12, UK23; *Van Der Mussele v. Belgium*, 23 November 1983, Application no. 8919/80 in UK12, UK30; *Van Droogenbroeck V, Belgium*, Report of the Commission 9 July 1980, Application N° 7906/77 in UK5, UK12; Article 4 ECHR in UK1, UK4, UK6, UK30; Palermo Protocol in UK1, UK19; ILO Convention in UK30; COE Convention explanatory notes in UK19; ECHR Forced labour and trafficking factsheet in UK1; Delphi Survey indicators for identifying adult victims of labour exploitation in *AG Ref Nos. 37, 38 and 65 of 2010* [2010] EWCA Crim 2880, para 12.

<sup>116</sup> *R v SK* [2010] EWCA Crim 1691 in UK4, UK5, UK9, UK12, UK23, UK30; *R v Connors* [2013] EWCA Crim 324 in UK4, UK12, UK14, UK23; *R v Connors Bristol* First instance in UK4, UK6, UK7; *R v Connors Luton* first instance judge’s legal directions to jury in UK5.

<sup>117</sup> Archbold Criminal Pleading, Evidence and Practice (Sweet & Maxwell) in UK5, UK9; Clayton and Tomlinson’s “The Law of Human Rights”, 2nd edition, volume I, paragraphs 9.17 to 9.20 (on the concepts of “slavery” and “servitude”) and paragraph 9.25 (on the concept of “forced or compulsory labour”) in UK12, UK30 [application to dismiss]; Leigh, “Trafficking people for sexual exploitation – new legislation” *Criminal Justice Weekly*, 14.9.2012 in UK19.

<sup>118</sup> Ministry of Justice Circular 2010/07 and Explanatory Note in UK5; Home Office guide for social workers in UK30.

<sup>119</sup> In BE47 the court referred to ILO forced labour indicators to assist with the understanding of work contrary to human dignity.

<sup>120</sup> Recognition of the legal reform in 2005 in BE1, BE32 (lower threshold: particularly vulnerable situation to vulnerable situation More in line with European legislation -EU Directive and COE convention); BE37, BE41, BE44 (recognition of larger scope of the offence in 2013); BE41 (recognition of the increased sentenced that reflects the number of victims following reform introduced by Loi du 24 juin 2013).

<sup>121</sup> BE13, BE32, BE35, BE41 refer to and quote from the following academic texts: Clesse, C.-E., ‘La notion de dignité humaine et son application pratique en matière de traite économique des êtres humains’, (2013) *Revue de Droit Pénal de de Criminologie*, 12, 854 – 877; Kurz, F., ‘Lutte contre le travail forcé, l’exploitation économique et la traite des êtres humains: des concepts légaux à l’application judiciaire’, (2008) *Chroniques de droit social* 317-330.

<sup>122</sup> BE13 - Unofficial translation, original text: “Le législateur a utilisé la notion de dignité humaine en matière de traite des êtres humains, car il devait répondre aux exigences du droit européen et du droit international, qui étaient notamment de sanctionner une plus grande diversité de situations.”

Therefore, regardless of the sources of law (international, regional and domestic) and the extent to which they provide legal clarity, there will always be, as Radeva Berket states, a role for the judiciary to ‘develop clear jurisprudence on labour exploitation allowing for interpretations to be used for future cases.’<sup>123</sup> However, as Smit opines, in light of the lack of assistance from the legal texts, the role of the judge in understanding and interpreting domestic legal provisions criminalising labour exploitation may be a tall order.<sup>124</sup> Consequently, and considering the complexity of this area of law, it is necessary for the judiciary (ideally, specialised judges<sup>125</sup>) to ensure consistent application and avoid confusion with other offences.<sup>126</sup> In England & Wales, whilst it is ultimately for the jury to decide the guilt of the defendant based on evidence heard during the trial, the judge’s understanding and interpretation of the domestic and regional law and judicial precedent can be discerned from the judge’s directions. Here it is the role of the judge to direct the jury by i) outlining the law and the “test” for determining the route to verdict,<sup>127</sup> and ii) directing them to acquit where insufficient evidence has been adduced by the prosecution.<sup>128</sup> As noted by the Court of Appeal in *R v SK* [2011] ECWA Crim 1691 (UK1):

*It was for the judge in his summing up to spell out to the jury what the relevant concept or concepts involved, and to do so in simple and clear language corresponding to the [judgment] of the European Court of Human rights.*<sup>129</sup>

In a civil law system, like the Belgian one, the role of the judiciary is to determine, with reference to the conditions contrary to human dignity listed in the *travaux préparatoires*, whether or not the factual circumstances of the case amounts to exploitation.<sup>130</sup> The file study reveals that in order to undertake this assessment, the judiciary places significant weight on the consistency and credibility of the civil parties

<sup>123</sup> For discussion of Dutch Supreme Court decision in October in 2009 of the so-called “Chinese restaurant case” see Radeva Berket (2015), supra n.67, p. 371.

<sup>124</sup> Smit (2011), supra n. 68, p. 186.

<sup>125</sup> See discussion on use of specialised judges in GRETA (2012), supra n.5, p. 35 and Craig, G., ‘The UK’s Modern Slavery Legislation: An Early Assessment of Progress’ (2017) *Social Inclusion* 5(2), 16–27, pp 24-5.

<sup>126</sup> See discussion on consistent application in GRETA (2013), supra n.1, p.57; Bowen (2017), supra n.122, p.223. See discussion on confusion with other cases in GRETA (2017), supra n.2, p.40.

<sup>127</sup> In UK4 the judge “was asked to provide a legal definition of servitude and forced labour, and while, making it clear that full directions would be given in his summing up, the judge, with the agreement of counsel, provided the jury with a working definition.” *R v Connors* [Luton] [2013] EWCA Crim 368, para 12 (UK4).

<sup>128</sup> *R v Connors* [Luton] [2013] EWCA Crim 368, para. 3 (UK4).

<sup>129</sup> *R v SK* [2011] ECWA Crim 1691, para 43 (UK1).

<sup>130</sup> BE35, BE41 and Myria (2016), supra n.71, p.143.

testimony as well as witness statements, that can be also corroborated with additional investigative elements such as searches of premises, telephone records etc.<sup>131</sup>

The need for a well-informed judiciary is especially vital as it will have a knock on effect on how prosecuting authorities seek to investigate and tackle cases of labour exploitation: where there is a guarded reaction from the judiciary, then restraint may well be exercised in tackling forms of exploitation where it is not known what a judge would qualify as exploitation.<sup>132</sup> In the context of England & Wales, the common law system, means that ‘case law is adaptable to the changing profile and methodology used in trafficking cases, without the necessity for change to statute.’<sup>133</sup> Furthermore, such a system places significant importance on the understanding of not only judges but also prosecuting authorities, as ‘it [is] for the Crown to make plain which of those three concepts was relied upon and then for the judge in his summing-up to spell out to the jury what the relevant concept or concepts involved, and to do so in simple and clear language.’<sup>134</sup> Finally, the relationship and sharing of expertise between the courts and the prosecutors is of importance in both jurisdictions analysed in this thesis: in Belgium, the role of specialised prosecutors in human trafficking investigations has been commended,<sup>135</sup> with responsibility for directing and following human trafficking cases and serve as contact persons for other stakeholders (e.g. judges, police officers, reception centres, Foreign Office).<sup>136</sup> According to GRETA, this contributes to ‘a consistent criminal policy response to human trafficking and ensures that human trafficking cases are investigated proactively.’<sup>137</sup> However, there is some concern both from GRETA and the Independent National Rapporteur for Belgium that the 2014 reorganisation of the judiciary and the federal police, which has resulted in a reduction of districts (from 27 to 12) and human resources, may lead to a loss of information for specialised anti-trafficking units which will need to rely on ‘maintaining good relations

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<sup>131</sup> Corroboration of witness statements given weight by judiciary in BE7, BE11, BE12, BE14, BE26, BE27, BE36, BE38 (led to acquittal by court of appeal due to lack of corroboration), BE39, BE41. Result of searches and other evidence given weight in BE9, BE15.

<sup>132</sup> As noted by Smit in the Netherlands. See Smit (2011), supra n. 68, p. 193. In the Netherlands: restraint from prosecutors and investigators in tackling exploitation outside the sex industry because of the guarded reaction of the judiciary in trafficking for labour exploitation cases.

<sup>133</sup> Bowen (2017), supra n.122, p.223. See for instance the proliferation of county line drug cases in 2017-2018, not mentioned during the drafting phase of the Modern Slavery Act 2015, in HM Government (21 March 2019), supra n.102, p.10-11.

<sup>134</sup> Anderson, A., ‘Case Comment: Trafficking people for exploitation: arranging and individual’s entry into United Kingdom with intention to exploit’ (2012) *Criminal Law Review* 1, 63-66, p. 65; *R v SK* [2011] ECWA Crim 1691, para 43 (UK1).

<sup>135</sup> GRETA (2017), supra n.2, p.40.

<sup>136</sup> GRETA (2013), supra n.1, p.14.

<sup>137</sup> GRETA (2017), supra n.2, p.40.

with the local police, which does not always give priority to the fight against human trafficking.’<sup>138</sup>

Despite the differences in the common and civil law systems in the procedural role of judges and the legal sources relied upon to implement the domestic implementation of these criminal offences, both jurisdictions acknowledge the need for a modern legal interpretation of labour exploitation. As reiterated by the Belgian judiciary in BE39:

*The facts are serious. They refer to harming another person by using of his/her vulnerability. **It is intolerable that in the 21st century, individuals make others work harshly in exchange of a mere lodging and a pittance.** This reflects an absolute lack of respect for these people, even if they were staying illegally, especially since there was no insurance against accidents at work [emphasis added].*<sup>139</sup>

In England & Wales, the Court of Appeal premises such a position on the need to acknowledge the prevalence of labour exploitation amongst groups as ‘economic exploitation of non-EEA nationals is a growing and largely undisclosed problem,’<sup>140</sup> and as such the issue should not be dismissed as an archaic notion remote from contemporary life in the United Kingdom.<sup>141</sup> Similarly, taking into consideration the ECHR as a living instrument (UK12) there is a need to interpret the law in line with changes in society’s behaviour and tolerance of such behaviour (UK30).

## 5. Concluding Remarks

The presentation of the composition and contextualisation of the file study reveals the **complexity of the factual circumstances** being handled by the courts in criminal cases. The composition and contextualisation of the file study reflect the differing

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<sup>138</sup> Centre fédéral pour l’analyse des flux migratoires, la protection des droits fondamentaux des étrangers et la lutte contre la traite des êtres humains (2013), supra n.72, p. 41; GRETA (2017), supra n.2, p.40.

<sup>139</sup> BE39 - Unofficial translation, original text: “*Les faits sont graves. Ils portent ainsi atteinte à la personne d’autrui dont la situation de faiblesse dans laquelle celle-ci se trouve, a été exploitée de manière poussée. Il est intolérable qu’au 21ème siècle, des individus en fassent travailler durement d’autres contre un simple hébergement et une pitance. Cela traduit un manque absolu de respect pour ces personnes, fussent-elles en séjour illégal et ce d’autant plus qu’il n’existait aucune assurance contre les accidents du travail.*”

<sup>140</sup> AG RefNos. 37, 38 and 65 of 2010 [2010] EWCA Crim 2880, paras 12- 13.

<sup>141</sup> R v SK [2011] ECWA Crim 1691, para 41 (UK1).



policy approaches to migration in the European Union, as presented by Radeva Berket.<sup>142</sup>

The first, prevalent in Belgium, refers to migration policies that govern the entry, residence and employment of third country nationals on EU territory. The composition of the file study reflects a large number of third country nationals as civil parties wherein the offences on the indictment amount to a combination of social criminal offences and criminal offences related to their irregular entry, residence and employment.

By contrast, the file study in England & Wales is reflective of the labour mobility policies establishing regulations for the movement of workers between EU Member States. The legal, financial and social implications of these policies on cross-border movement vary, which is also reflected in the file study, with England & Wales including offences related to fraudulent misrepresentations in social security benefits and financial exploitation, that are not prominent in Belgium due to the non-access to social security system and financial services of undocumented third country nationals.

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<sup>142</sup> Radeva Berket (2015), *supra* n.67, p. 360-361.



## **CHAPTER 8 – The formal and substantive criminalisation of labour exploitation in Belgium and England & Wales**

### **0. Introduction and structure of the chapter**

In Part I we illustrated that a criminal law approach has been the most prominent to tackling human trafficking. Consequently, the implementation of effective law enforcement and crime prevention measures have not only sought to increase the number of prosecutions but also to act as a deterrent.<sup>143</sup> However, despite such an emphasis on prosecution, global and regional prosecution rates remain disproportionately low. Convictions for trafficking for labour exploitation remain difficult to obtain. We contend that one of the main reasons for this is the lack of a definition of exploitation in the trafficking protocol and the subsequent conflation of terms such as forced labour, slavery and trafficking for labour exploitation, despite their very different legal meanings (as demonstrated in Chapters 1-3). Subsequently, as we have seen in Chapter 4, in light of the lack of a ‘universally-accepted definition of trafficking for labour exploitation’ a fragmented understanding of human trafficking exists, with the offence meaning different things in different countries.<sup>144</sup> Therefore, despite many EU Member States having amended national legislation to ensure the transposition of the regional definition, there is still a significant gap in how domestic

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<sup>143</sup> The Anti Trafficking monitoring group (2018), *supra* n. 97, p. 34.

<sup>144</sup> Radeva Berket (2015), *supra* n.67, p. 369-370.

legislatures understand labour exploitation both within the confines of the human trafficking paradigm and beyond. England & Wales and Belgium, the two domestic jurisdictions that are the object of comparative scrutiny, are indicative of such a proclamation. In this part of the thesis, we present the comparative analysis of the two national legal orders that seeks to determine how labour exploitation is formally and substantively criminalised (present Chapter), judicially applied and interpreted (Chapters 9 & 10) in national legal orders.

With this chapter we answer the following subsidiary research question: *How is labour exploitation substantively and formally criminalised in Belgium and England & Wales?*

We will preliminarily analyse the implementation of labour exploitation offences into the domestic criminal law of these two jurisdictions by the legislative and the judiciary. The analysis of the criminalisation of labour exploitation is twofold: first, the *formal criminalisation* of labour exploitation by the legislative considers the intentions of the law makers which is secondly overseen by the *substantive criminalisation* which considers the judicial adjudication of black-letter law.<sup>145</sup> The dual focus acknowledges that whilst there is an overall goal of compliance with supranational legal obligations to domestically prohibit labour exploitation, there are limits to the political process when it comes to determining the legal framework. Thus, the role of the courts is vital to ensuring that labour exploitation is handled and assessed in a consistent manner.

There are no standalone offences for slavery, servitude and forced labour in Belgian law.<sup>146</sup> Instead the legislative opted for an approach whereby slavery, servitude and forced or compulsory labour are encompassed by the understanding of human trafficking as ‘work or living conditions contrary to human dignity’ and the removal of the means element.<sup>147</sup> The adoption of a broader human trafficking definition sought to

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<sup>145</sup> Lacey, N., ‘Theorising criminalisation through the modalities approach: A critical appreciation’ (2018) *International Journal for Crime, Justice and Social Democracy* 7(3), 122-127, p.123. ‘formal criminalisation’—the full range of offences, whether created by statute or customary/common law, which are valid in a particular legal system at any moment in time—and ‘substantive criminalisation’—the patterns of enforcement of those valid norms through the criminal process.

<sup>146</sup> Clesse, Ch.-E., *La traite des êtres humains. Législation belge éclairée des législations française, luxembourgeoise et suisse*, (Bruxelles: Larcier, 2013), p.268. See also BE13, BE41, BE44 where courts reiterated that there is no criminalisation of forced labour or economic exploitation as standalone offences and thus, to identify human trafficking, this element alone is not sufficient.

<sup>147</sup> Huberts & Minet (2014), *supra* n. 16, p.34.

overcome difficulties such as the non-recognition of victim status amongst potential victims.<sup>148</sup> Thus the analysis of the legal framework in Belgium, will focus upon a single provision: human trafficking for the purposes of economic exploitation (Section 1). Conversely, in England & Wales, the criminalisation of human trafficking saw a gradual development, first introduced in 2002 but restricted to the traffic of prostitution and then extended in material scope to include other forms of exploitation in accordance with the international and regional definition (Section 1). Only in 2009, were the standalone offences of slavery, servitude and forced or compulsory labour criminalised (Section 2). In this thesis, we employ the following legal terms: human trafficking, slavery, servitude and forced or compulsory labour. However, since 2013, the British parliament have opted for the operationalisation of a non-legal term in both law and policy matters: “modern slavery.”<sup>149</sup> We posit that “modern slavery” is ‘an umbrella term that covers the offences of human trafficking, slavery, servitude and forced labour.’<sup>150</sup> Importantly, this terminology has been criticised as it ‘fails to recognise historical and local perspectives that may be linked to the notion and past experiences of slavery,’ hence we refrain from employing such terminology.<sup>151</sup>

Finally, we seek to place significant emphasis on the role of law (Chapters 1-4), lawmakers and the legal professionals who are responsible for implementing and interpreting the law (see Section 4, Chapter 7, current Chapter & Chapters 9-10). However, it is acknowledged that a wide variety of actors are integral to tackling such a complex phenomenon, and indeed, the law alone is not the answer; as the UK Anti-trafficking Monitoring Group noted, ‘it takes an emergent complex system to fight a complex system.’<sup>152</sup> Whilst our focus here is on the judiciary in criminal cases, there is of course a need for further examination of the role of judges in administrative and labour jurisdictions as well as other professionals such as labour inspectors, trade unions and civil society actors. Nevertheless, we contend that the insight into the criminalisation of the labour exploitation offences (present Chapter) and the judicial interpretation of the concept of exploitation (Chapters 9 & 10) is valuable to subsequent efforts that seek to conceptualise exploitation in a broader setting.

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<sup>148</sup> Huberts & Minet (2014), *supra* n. 16, p.34.

<sup>149</sup> Despite the change in terminology at a UK level, legislation in Scotland and Northern Ireland retains references to human trafficking, rather than the term modern slavery.

<sup>150</sup> HM Government (2017), *supra* n.7, p.4.

<sup>151</sup> The Anti Trafficking monitoring group (2018), *supra* n. 97, p. 10.

<sup>152</sup> The Anti Trafficking monitoring group (2018), *supra* n. 97, p. 13.

## 1. Human trafficking for labour exploitation in Belgium and England & Wales: the legal framework

Both Belgium and England & Wales have adopted an incremental approach to the development of anti-trafficking law and policy.

In Belgium, the **Law of 10 August 2005 amending various provisions with a view to strengthening action to combat people-smuggling and trafficking in human beings and the practices of slum landlords** [*Loi du 10 août 2005 modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains et contre les pratiques des marchands de sommeil*] created a specific and exclusive offence of human trafficking defined in Article 433quinquies of the Criminal Code:<sup>153</sup>

*§1. Any form of recruitment, transport, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, in order to:*

*1° enable the offences as mentioned in Articles 379, 380 para. 1 and para. 4, and in Art. 383bis para. 1 to be committed against that person;*

*2° enable the offence as mentioned in Art. 433ter to be committed against that person*

*3° employ or enable that person to be employed in circumstances contrary to human dignity;*

*4° remove or enable the removal of organs or tissues on that person in violation of the Law of 13 June 1986 concerning the removal and transplant of organs;*

*5° or, to force the person to commit a crime or an offence against his will.*

*Except for the case as mentioned under point 5, it is irrelevant whether the person referred to in paragraph 1, gave his/her consent to the intended or actual exploitation.*

The 2005 Law sought domestic conformity with international and European legal obligations by clearly distinguishing between human trafficking and human smuggling.<sup>154</sup> Furthermore, shifting the offence of human trafficking from immigration

<sup>153</sup> Beernaert, M.-A., & Le Cocq, P., 'La loi du 10 août 2005 modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains et contre les pratiques des marchands de sommeil', (2006) *Revue de droit pénal et de criminologie* 86(4), 335-406, p. 365-66; Exposé des motifs du Projet de loi du 14 janvier 2005 modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains, (Doc. Parl. St. Chambre, 2004-2005, DOC 51 1560/001), p. 3.

<sup>154</sup> Previously Article 77bis, Law of 15 December 1980 on foreigners had combined the offences of human trafficking, human smuggling and slum landlord into one provision: Huberts, C., 'Les innovations de la loi du 10 août 2005 modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains et contre les pratiques des marchands de sommeil', (2006) *Journal du Droit des Jeunes* n°251, 6-22; Minet, J. F., 'Chronique de Législation Pénale (année 2005)' (2006)

law into the Criminal Code ensured that the criminalisation of trafficking in human beings was applicable to all persons, including Belgian nationals, and not just victims who are non-Belgian EU citizens or third country nationals.<sup>155</sup> Article 433quinquies was subsequently amended by the **Law of 29 April 2013 amending the Article 433quinquies of the Criminal Code with a view to clarify and extend the definition of trafficking in human beings** [*Loi du 29 avril 2013 visant à modifier l'article 433quinquies du Code pénal en vue de clarifier et d'étendre la définition de la traite des êtres humain*]:

*The offence of human trafficking constitutes the recruitment, transport, transfer, housing, harbouring, taking control or transferring of the control over a person for the purposes of:*

*1° the exploitation of prostitution or other forms of sexual exploitation;*

*2° the exploitation of begging;*

*3° carrying out work or providing services in conditions contrary to human dignity;*

*4° removal of organs in violation of the law of 13 June 1986 on the removal and transplantation of organs, or human tissue in violation of the law of 19 December 2008 on the acquisition and use of human tissue for the purposes of medical applications in humans or scientific research;*

*5° or having this person commit a crime or a misdemeanour against his or her will.*

*Except for the case as mentioned under point 5, it is irrelevant whether the person referred to in paragraph 1, gave his/her consent to the intended or actual exploitation.*

The purpose of the reform was twofold: to transpose the EU Directive 36/2011 and to further clarify and extend the definition of trafficking in human beings.<sup>156</sup> Further legislative reform in 2013, increased the maximum financial penalty of 50,000 Euros for human trafficking for all forms of exploitation by introducing a requirement to multiply the amount of any fine by the number of victims (Article 433quinquies § 4).<sup>157</sup>

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*Revue de Droit Pénal et de Criminologie* 3, 240–280, p. 277; Beernaert & Le Cocq (2006), supra n.153, p. 350-51; Travaux parlementaires, Projet de loi modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains et contre les pratiques des marchands de sommeil, rapport fait au nom de la commission de la justice, 2005, no 3-1138/4, p. 3.

<sup>155</sup> Minet (2005), supra n. 154, p.278; Beernaert & Le Cocq (2006), supra n.153, p. 365-66; GRETA (2013), supra n.1, p. 11.

<sup>156</sup> Rapport fait au nom du Groupe de travail traite des êtres humains, de Mme DÉSIR, 27 mars 2012, (Doc. parl., Sénat, n° 5-1073/1); Rapport fait au nom de la Commission de l'Intérieur et des Affaires administratives, de M. CLAES, 4 mai 2010 (Doc. parl., Sénat, n° 4-1631/1); Huberts & Minet (2014), supra n. 16, p. 6; GRETA (2013), supra n.1, p.11.

<sup>157</sup> Introduced by Loi du 24 juin 2013 portant répression de l'exploitation de la mendicité et de la prostitution, de la traite et du trafic des êtres humains en fonction du nombre de victimes; GRETA (2017), supra n.2, p.7.

Both iterations of the human trafficking offence in Belgium include two of the three constituent elements of the regional/international human trafficking definition: the act (the material element/ *actus reus*) and the exploitation (the moral element/ *mens rea*). The means element is included as aggravating factors (Article 433septies). The composition of the offence was deliberate with a view to ensuring the effectiveness of criminal proceedings and the protection of victims<sup>158</sup> by, as GRETA notes, ‘mak[ing] it easier to come up with the evidence required to convict the perpetrators of trafficking.’<sup>159</sup> Furthermore, the framing of the scope of the domestic offence of human trafficking is intentionally broader than the international definition, as explained by Kurz it ‘is intended to cover not just forced labour and slavery but also situations of very low salaries or of obviously unhealthy or dangerous conditions of labour.’<sup>160</sup>

In England & Wales,<sup>161</sup> following ratification of the Palermo Protocol, the offence of human trafficking was introduced by **Section 145 Nationality, Immigration and Asylum Act 2002**, however it was limited to the traffic of prostitution.<sup>162</sup> The non-prohibition of trafficking for labour exploitation was deemed to be justified any other forms of exploitation dealt with by existing measures; namely, immigration offences and other offences concerning fraud, forgery (of documents), false imprisonment, sexual offences and offences against the person.<sup>163</sup> Soon thereafter, the gap created by the non-prohibition of trafficking for labour exploitation was filled with the entry into force of **Section 4 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004** which established the offence of trafficking people for exploitation.<sup>164</sup>

<sup>158</sup> Beernaert & Le Cocq (2006), *supra* n.153, p. 367.

<sup>159</sup> GRETA (2013), *supra* n.1, para 52.

<sup>160</sup> Kurz, F., ‘Lutte contre le travail forcé, l’exploitation économique et la traite des êtres humains: des concepts légaux à l’application judiciaire’, (2008) *Chroniques de droit social* 317-330; ILO, *Forced Labour and Human Trafficking Casebook of Court Decisions: a training manual for judges, prosecutors and legal practitioners*, Special Action Programme to Combat Forced Labour, Geneva, 2009, p.58.

<sup>161</sup> When discussing England & Wales, the analysis – unless appropriate – does not refer to the legal and policy development in the devolved jurisdictions (namely, Scotland and Northern Ireland). The law and policy on anti-trafficking is split between devolved administrations and central government: criminal law, education and health policy relevant to victim protection, support and assistance are devolved matters and border an immigration control, including the identification of trafficking victims are reserved matters. GRETA (2012), *supra* n.5, p.13.

<sup>162</sup> Amended by s14 Policing and Crime Act 2009 and s109 Protection of Freedoms Act 2012.

<sup>163</sup> House of Commons Library, *Asylum and Immigration: the 2003 Bill Research Paper 03/88* (11 December 2003), p.84. See application of Human Rights Act 1998 for successful Article 4 claims involving trafficking and forced domestic labour where appellant was held in “conditions of virtual slavery”, *Miss T v SSHD* (AS/03637/2004), in which a policy apology for failing to investigate is also (para. 75). See also Immigration Appeals Authority decisions: *Miss AB v SSHD* (CC/64057/2002); *Ms Tam Thi Dao v SSHD* (HX/28801/2003). Cited in Anderson & Rogaly (2005), *supra* n.21.

<sup>164</sup> Asylum and Immigration (Treatment of Claimants, etc.) Bill (HC Bill 109), 2003 (as introduced in House of Commons), 27 November 2003; Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (c.19); Further amended by section 110 The Protection of Freedoms Act 2012 (c. 9).



*(1) A person commits an offence if he arranges or facilitates the arrival in [or entry into] the United Kingdom of an individual (the “passenger”) and—*

*(a) he intends to exploit the passenger in the United Kingdom or elsewhere, or*

*(b) he believes that another person is likely to exploit the passenger in the United Kingdom or elsewhere.*

*(2) A person commits an offence if he arranges or facilitates travel within the United Kingdom by an individual (the “passenger”) in respect of whom he believes that an offence under subsection (1) may have been committed and—*

*(a) he intends to exploit the passenger in the United Kingdom or elsewhere, or*

*(b) he believes that another person is likely to exploit the passenger in the United Kingdom or elsewhere.*

*(3) A person commits an offence if he arranges or facilitates the departure from the United Kingdom of an individual (the “passenger”) and—*

*(a) he intends to exploit the passenger outside the United Kingdom, or*

*(b) he believes that another person is likely to exploit the passenger outside the United Kingdom.*

*(4) For the purposes of this section a person is exploited if (and only if)—*

*(a) he is the victim of behaviour that contravenes Article 4 of the Human Rights Convention (slavery and forced labour),*

*(b) he is encouraged, required or expected to do anything as a result of which he or another person would commit an offence under the Human Organ Transplants Act 1989 (c. 31) or the Human Organ Transplants (Northern Ireland) Order 1989 (S.I. 1989/2408 (N.I. 21)),*

*(c) he is subjected to force, threats or deception designed to induce him—*

*(i) to provide services of any kind,*

*(ii) to provide another person with benefits of any kind, or*

*(iii) to enable another person to acquire benefits of any kind, or*

*(d) he is requested or induced to undertake any activity, having been chosen as the subject of the request or inducement on the grounds that—*

*(i) he is mentally or physically ill or disabled, he is young or he has a family relationship with a person, and*

*(ii) a person without the illness, disability, youth or family relationship would be likely to refuse the request or resist the inducement.*

*(5) A person guilty of an offence under this section shall be liable—*

*(a) on conviction on indictment, to imprisonment for a term not exceeding 14 years, to a fine or to both, or*

*(b) on summary conviction, to imprisonment for a term not exceeding twelve months, to a fine not exceeding the statutory maximum or to both.*

Whilst the expansion of human trafficking to also include labour exploitation was a welcome development, the limitation of the occurrence of labour exploitation to human trafficking has been critiqued by Balch and others as it failed to prohibit the labour exploitation of non-trafficked individuals.<sup>165</sup> Furthermore, the legislation was placed within the context of immigration law, ‘suggesting that the primary concern is with the movement and its facilitation as constituting the kernel of the crime of trafficking, rather the forced labour aspects or abusive employment relations.’<sup>166</sup> **Section 2 Modern Slavery Act 2015** overcame this issue by consolidating all human trafficking offences into one criminal law statute:

*(1) A person commits an offence if the person arranges or facilitates the travel of another person (“V”) with a view to V being exploited.*

*(2) It is irrelevant whether V consents to the travel (whether V is an adult or a child).*

*(3) A person may in particular arrange or facilitate V’s travel by recruiting V, transporting or transferring V, harbouring or receiving V, or transferring or exchanging control over V.*

*(4) A person arranges or facilitates V’s travel with a view to V being exploited only if—  
(a) the person intends to exploit V (in any part of the world) during or after the travel,  
or*

*(b) the person knows or ought to know that another person is likely to exploit V (in any part of the world) during or after the travel.*

*(5) “Travel” means—*

*(a) arriving in, or entering, any country,*

*(b) departing from any country,*

*(c) travelling within any country.*

*(6) A person who is a UK national commits an offence under this section regardless of—*

*(a) where the arranging or facilitating takes place, or*

*(b) where the travel takes place.*

*(7) A person who is not a UK national commits an offence under this section if—*

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<sup>165</sup> Balch, A., *Regulation and enforcement to tackle forced labour in the UK: a systematic response?*, JRF Programme Paper (2012), p. 11; Percival, R., *Cases in Brief Forced or compulsory labour: Attorney General’s Reference of 2013 (Connors and Others) [2013] EWCA Crim 324; March 26, 2013* (2013) *Archbold Review* 4, 3, p.3.

<sup>166</sup> Anderson & Rogaly (2005), *supra* n.21, p. 8.

- (a) any part of the arranging or facilitating takes place in the United Kingdom, or
- (b) the travel consists of arrival in or entry into, departure from, or travel within, the United Kingdom.

In the remainder of this section, we will further consider the aforementioned legislative developments in both jurisdictions through examination of the formal and substantive criminalisation of each constituent element in turn (Sections 2.1 – 2.3) and will provide insight into how the material scope of exploitation has been understood by the judiciary (Section 2.4).

### 1.1. The *actus reus*: a replica or an evolutionary element?

In Belgium, the material element of the human trafficking offence (i.e. the act) predominantly replicates the European definition by listing a number of actions.<sup>167</sup>

Law of 10 August 2005:

*Any form of recruitment, transport, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person*

Law of 29 April 2013:

*The recruitment, transport, transfer, housing, harbouring, taking control or transferring of the control over a person*

The file study reveals that the courts have been required to provide further reflection upon the interpretation of **recruitment**, as there is no legal reference or further explanation provided in the *travaux préparatoires*.<sup>168</sup> As a result, the Court of Cassation of Brussels in 2014 (BE13), ruled that the understanding of recruitment must be in accordance with its ordinary meaning [*sens commun*]. Moreover, the court held that the recruitment of the exploited person may be triggered by the individual themselves who solicits the work in the first instance.<sup>169</sup> The ruling of the Court of Cassation was further developed by the Court of Appeal in Mons in 2016 (BE18).

<sup>167</sup> Beernaert & Le Cocq (2006), supra n.153, p. 367.

<sup>168</sup> BE13, BE18, BE24

<sup>169</sup> BE13, applied subsequently in BE16 and BE21, BE24, BE27, BE36. See also Kurz (2008), supra n. 160.

Whilst accepting that the term should be interpreted according to its ordinary meaning and that the individual themselves could have solicited employment in the first instance, the court also held that there was no need for a contract or a “lien de subordination” – see below. In a high-profile case of the Court of First Instance in Brussels in 2017 (BE47), the understanding of recruitment was also crucial to the acquittal of the defendants of alleged social penal offences but not of the human trafficking offence. Here, the court made a distinction between the accommodation and recruitment of the domestic workers and held that the recruitment agency employed by the royal family were responsible for recruitment and procedures related to the status of the staff and their remuneration.

The 2013 law slightly amended the phrasing of the 2005 Act which referred to **shifting** or transferring control [*passer ou transférer le contrôle*]. The new law states that a person may **take** or transfer control [*prendre ou transférer le contrôle*]. The new terminology sought to shift away from the previous text - as the reference to transfer of control restricted the scope to the sale of a person - by making reference to the exertion of control over another person for the purposes of exploitation and asserting a more expansive meaning that could include other forms of exploitation such as illegal adoption of forced marriage.<sup>170</sup>

The scope of the meaning of exercise of authority [*lien de subordination*] was the focus of the courts in the early cases in the sample in 2010.<sup>171</sup> Here the court emphasised that the status of workers as active associates [*associés actifs*] did not exonerate the parties from the exploitation, as the designation of ‘active associates was purposefully implemented with the intention of avoiding the formal status of workers,

<sup>170</sup> Centre fédéral pour l’analyse des flux migratoires, la protection des droits fondamentaux des étrangers et la lutte contre la traite des êtres humains, traite des être humain construire des ponts (2013), supra n.72, p. 39; Amendement au projet de loi visant à modifier l’article 433quinquies du Code pénal afin de clarifier et d’étendre la définition de la traite des êtres humains à l’exploitation sexuelle, Doc.parl., Chambre, Doc 53-2607/002, p. 4.

<sup>171</sup> In BE1 a non-employment relationship was argued on the basis that the defendants tried to contest the recruitment of undeclared employment of foreign national by stating that the workers were sub-contracted or active partners. But the judge ruled that no evidence existed to demonstrate that this is plausible. All sub-contractors identified could not be contacted as they did not exist and did not work on the construction site and the designation of active partners was done with the intention of avoiding the formal status of workers, especially taking into account the services accomplished; In BE2, the court cited La loi du 30 avril 1999 relative à l’occupation des travailleurs étrangers and the expansive understanding of subordination : “la seule constatation de prestations de travail effectuées sous l’autorité d’une autre personne, quel que soit le cadre juridique sous couvert duquel elles sont effectuées, rentre dans le champs d’application de la loi du 30 avril 1999.” (Cour du Travail de Bxl, 5 janv.2006, www.juridat.be, n°JS61783\_1).

In BE3 the Exercise of control/authority was assessed according to the control of hours worked and daily instructions on the precise content of the tasks to be carried out was considered to be in accordance with the subordination that is characteristic of a contract of employment.

especially taking into account the services accomplished’<sup>172</sup> and that the *lien de subordination* can be determined as: ‘exercised a real authority over the workers, not only controlling workers' hours of work, but also giving them daily instructions on the precise content of the tasks to be performed.’<sup>173</sup> In one case, the court emphasised that the determination of a *lien de subordination* was sufficient on the basis that there is evidence that the individual exercised control over the acts of the individual (BE3).

In England & Wales, as the offence of human trafficking has evolved, so too has the constituent action element. However, unlike the international, regional and Belgian definitions, the focus of the *actus reus* of human trafficking is limited to the arranging or facilitation of travel of an individual.

Sections 4 (1), (2), (3), Asylum and Immigration (Treatment of Claimants, etc.) Act 2004

*(1) A person commits an offence if he arranges or facilitates the arrival in [or entry into] the United Kingdom of an individual (the “passenger”)*

*(2) A person commits an offence if he arranges or facilitates travel within the United Kingdom by an individual (the “passenger”)*

*(3) A person commits an offence if he arranges or facilitates the departure from the United Kingdom of an individual (the “passenger”)*

Sections 2(1), (3), (5), Modern Slavery Act 2015

*(1) A person commits an offence if the person arranges or facilitates the travel of another person (“V”) [...]*

*(3) A person may in particular arrange or facilitate V’s travel by recruiting V, transporting or transferring V, harbouring or receiving V, or transferring or exchanging control over V [...]*

*(5) “Travel” means— (a) arriving in, or entering, any country, (b) departing from any country, (c) travelling within any country.*

<sup>172</sup> BE1 – Unofficial translation, original text: “les sous-traitants désignés soit n’ont pu être contactés, l’identité s’avérant fantaisiste, soit ne sont manifestement pas intervenus sur les chantiers; Quant aux associés, il apparaît, compte tenu des prestations effectivement accomplies, qu’ils n’avaient cette qualité que de façon formelle, pour éviter l’application du statut réel d’ouvrier.”

<sup>173</sup> BE2 - NB this does not refer to human trafficking, but the illegal employment of foreign workers. Unofficial translation, original text: “exerçait sur les ouvriers une réelle autorité, contrôlant non seulement les heures de prestations des ouvriers, mais leur donnant également des directives quotidiennes sur le contenu précis des tâches à exécuter.”

Prior to 2015, the geographical scope of the action was limited to travel into (arrival/entry), within or out of (departure) the United Kingdom (the UK), until section 2(5)-(6) of the Modern Slavery Act 2015 broadened the action to include “any country”.<sup>174</sup> The lifting of geographical limitations ensures compliance with regional standards, by recognising that any persons may be potential victims of trafficking, including internally trafficked persons such as British nationals and foreign nationals who are not trafficked until they are within the UK.

In the international and regional definition, travel is only one of the possible actions and as such is not a necessary condition.<sup>175</sup> However, despite efforts to broaden the scope of the action element so that there is consistency with the international and regional definition, the action element remains limited. The rationale for such a limitation is explained in the explanatory notes of the Modern Slavery Act 2015, where it is stated that such wording is sufficient to ‘the definitions of trafficking set out in the Convention on Action against Trafficking and the associated Palermo Protocol’<sup>176</sup> and ‘a broad interpretation of what is meant by ‘travel’, including movement over a very small space is taken in practice.’<sup>177</sup> The limitation continues to add to the confusion in judicial proceedings when trying to determine the meaning and scope of “travel” where the movement of a victim is difficult to prove.<sup>178</sup> Consequently, despite the fact that ‘human trafficking is the process of bringing a person into exploitation’, the framing of human trafficking from the perspective of the process (movement/travel), rather than its outcome (exploitation) fails to consider the abuse of a position of vulnerability of potential victims of trafficking.<sup>179</sup>

The file study confirms that the narrow action element of the human trafficking offence is reflected in the interpretation of the offence, with the focus solely on the facilitation or arranging of travel. The other actions (recruiting, harbouring,

<sup>174</sup> See also amendments in The Protection of Freedoms Act 2012 amended the Sexual Offences Act 2003 and the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.

<sup>175</sup> HC, *Notices of Amendments given up to and including Friday 31 October 2014 Consideration of Bill Modern Slavery Bill, As Amended*, 31 October 2014.

<sup>176</sup> Modern Slavery Act 2015 (c.30) Explanatory Notes, Section 2; Modern Slavery Bill (HC Bill 8), 2014-2015 (as introduced in the House of Commons), 10 June 2014, Explanatory notes, p.5.

<sup>177</sup> HM Government (21 March 2019), supra n.102, p.12.

<sup>178</sup> GRETA (2012), supra n.5, p.24; HC, *Report stage*, 4 November 2014, Col 714; See evidence given by Nadine Finch in HC, *Public Bill Committee Modern Slavery Bill [First Sitting]*, 21 July 2014, p. 19-20; HC, *Public Bill Committee Modern Slavery Bill [Fourth and Fifth Sitting]*, 4 September 2014 p.5. The Anti-Trafficking Monitoring Group, *Class Acts? Examining modern slavery legislation across the UK*, October 2016, p. 6; HM Government (21 March 2019), supra n.102, p. 10-11.

<sup>179</sup> The Anti Trafficking monitoring group (2018), supra n. 97, p. 10.

transferring, receiving, and transferring or exchanging control of persons) are excluded as acts on their own. Instead, they must be intricately connected to the arrangement or facilitation of travel.<sup>180</sup> In UK19, the judge noted that since the action was limited to the facilitation or arrangement of travel or - in the case of a conspiracy - have knowledge of an agreement to arrange or facilitate the travel of a person within the UK for the purpose of exploitation, then the mere employment or recruitment of a trafficked person is not sufficient for a conspiracy to traffic.<sup>181</sup>

## 1.2. The *mens rea*: the intention to exploit as the end result

The second element that is present in both jurisdictions is that the action must be taken for the purpose of exploitation, constituting the *mens rea* of the offence.

In Belgium, it is reiterated that the crime of human trafficking, must be examined in its entirety, namely through the identification of the two constituent elements: the act and purpose of exploitation. However, of particular importance to the Belgian context is the *mens rea* element that demonstrates the criminal intention to exploit an individual, as Kurz writes:

*It is the presence of this specific intention (to exploit) that makes the behaviour of an author punishable under the offence of trafficking in human beings.*<sup>182</sup>

For trafficking to be established, the *mens rea* must determine that the act was followed by one of the forms of exploitation listed in Article 433 of the Criminal Code. For the purposes of establishing the existence of a *dol special*, it is sufficient for the individual to have knowledge of the illicit character of the facts to be perpetrated against the victim, without it being necessary for them to know precisely the nature of the

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<sup>180</sup> UK1, UK3, UK4, UK7, UK9, UK19, UK25.

<sup>181</sup> UK19, judge's directions to jury: "I must direct you that as a matter of law simply employing someone who has been trafficked is not enough, even if you know they've been trafficked there must be something more."

<sup>182</sup> Kurz, F., 'Un trop long dimanche de finanças ou lorsque le respect de la tradition mène au viol et à la traite des êtres humains,' (2014) *Journal du Droit des Jeunes* N° 339, 23-29. Unofficial translation, original text: "C'est la présence de cette intention spécifique qui rend le comportement de tel auteur punissable du chef de traite des êtres humains."

The lack of means in the Belgian definition of human trafficking means that the offence is considered to be broad enough to include other forms of exploitation. In the Netherlands, the distinction is made according to the intended purpose of the exploitation. 'The essence of the Dutch anti-trafficking law is '(intended) exploitation', regardless of nationality of the victims or of movement across borders. So, no difference is made between trafficked and non-trafficked victims for forced labour: exploiting Dutch citizens in labour situations can also be considered trafficking' In Smit (2011), *supra* n. 68, p. 186.

offence.<sup>183</sup> The new trafficking offences provide precision as to the meaning of the moral element: for the purpose of exploitation [*la finalité de l'exploitation*] shifting away from the requirement of coercion, as outlined by the means with the hope that the investigation and prosecution of human trafficking would be facilitated.<sup>184</sup>

In contrast, in England & Wales, three standards of *mens rea* have emerged from the legislative development: i) the person intends to exploit (2004 Act and 2015 Act); ii) the person believes that another person is likely to exploit (2004 Act) and iii) the person knew or ought to have known that another person is likely to exploit (2015 Act). The offence of human trafficking for labour exploitation (in both 2004 and 2015) establishes a high threshold by requiring that at the time of the action, intention to exploit or belief that another person would exploit was present at the time when the alleged victim arrived/entered in, travelled within or departed from the United Kingdom.<sup>185</sup> The file study affirmed this with the judges' route to verdict clearly requiring the jury to be sure that the defendant, at the time of the action, intended to exploit the victim (UK7, UK9). Nevertheless, Balch raises the problematic nature of the need for knowledge of exploitation when applying it to operational circumstances. The concrete impact being that for many cases involving labour exploitation, 'there have been issues over the difficulty in being able to prove intent to traffic' leading to not-guilty verdicts in cases brought to trial.<sup>186</sup>

Such difficulties are arguably limited in practice since both legislative frameworks do not require actual exploitation to have taken place, it is sufficient to merely demonstrate the intent to exploit.<sup>187</sup> Whilst the courts have acknowledged this distinction (BE41, BE44, UK1), we can discern from the file study that the factual circumstances of the cases refer to situations of *de facto* exploitation. The implication of this being that the assessment of *mens rea* is often premised upon the evaluation of actual exploitation. For example, in Belgium, the file study demonstrates that in the majority of cases, the judicial examination of the *dol special* rested upon the

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<sup>183</sup> Clesse (2013), supra n. 111, p.199.

<sup>184</sup> Huberts (2006), supra n.154, p. 8; The pre-legislative documents acknowledge that the draft law is stricter than the Directive as it does not require proof of all of the elements for the behavior to be considered criminal, see Exposé des motifs du Projet de loi du 14 janvier 2005 modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains, (Doc. Parl. St. Chambre, 2004-2005, DOC 51 1560/001), p. 11.

<sup>185</sup> Anderson (2012), supra n.145, p. 66.

<sup>186</sup> See more discussion on examples of cases that have led to not-guilty verdicts in Balch (2012), supra n.165, p. 33-38.

<sup>187</sup> Huberts (2006), supra n.154, p. 11; Beernaert & Le Cocq (2006), supra n.153, p. 368.



interpretation of “conditions contrary to human dignity” (BE13). The same is applicable to the British file study, where in all human trafficking cases, the actual exploitation had occurred and as a result it is inevitable that judges and juries alike assess the evidence of actual exploitation in order to ascertain whether or not an offence has been committed, as noted by the Court of Appeal in *R v SK* [2011] EWCA Crim 1981 (UK1). Interestingly, in that case, the first instance judge ruled that intention to exploit can be proven by actual exploitation. However, this position was overruled by the Court of Appeal, whereby it was affirmed that human trafficking is an “offence of intention”, and as a result it is not a necessary element for the jury’s consideration, as it was for the Crown to prove that the appellant had arranged or facilitated the complainant’s entry into the United Kingdom intending when [the defendant] did so to exploit [the complainant], as noted by the Court of Appeal:

*The judge's third question in the written directions he provided to the jury, which invited them to consider whether at some stage during the period covered by the indictment the appellant had in fact exploited the complainant, was not a question which the jury had to answer in the affirmative if it was to convict the appellant.*<sup>188</sup>

Subsequent cases affirmed that the intention to exploit must be proven to exist at the time of the action (facilitation or arranging of travel into the UK, within the UK, departure from the UK) but that the exploitation does not necessarily have to subsequently take place.<sup>189</sup> Again, however, in practice the file study reveals that the assessment of the *mens rea* is heavily influenced by the factual circumstances of actual circumstances presented in evidence to the court.

### **1.3. The means: a non-constituent element**

Unlike the regional and international definition of human trafficking, both jurisdictions do not envisage the means to be a compulsory constituent element.<sup>190</sup> The lack of means in both jurisdictions suggests *prima facie*, that coercion, threats or menace of violence are not required to fulfil the action.

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<sup>188</sup> *R v SK* [2011] EWCA Crim 1981, para 38 (UK1).

<sup>189</sup> UK1, UK3, UK5, UK7, UK8, UK9, UK15.

<sup>190</sup> UNODC, *Model Law against Trafficking in Persons* V.09-81990 (E) (2010), p. 25

In England & Wales, the means have not been included as a constituent element of the offence of human trafficking since the Sexual Offences Act 2003, where the domestic legislation went beyond the Palermo Protocol by not requiring traffickers to use coercion, deception or force during recruitment of trafficking victims. Prior to this, the offence of trafficking for prostitution was characterised by a person exercising ‘control over prostitution by another if for purposes of gain he exercises control, direction or influence over the prostitute’s movements in a way which shows that he is aiding, abetting or compelling the prostitution.’<sup>191</sup> Ultimately, the non-inclusion of means was justified as part of the need to ensure that children or vulnerable people were covered by the offence, as it is impossible to force, coerce or deceive a child or a vulnerable person. Nevertheless, the non-inclusion of means in the offence of human trafficking has been critiqued by GRETA and efforts were made, to no avail, in subsequent legislative drafting to include this element so as to align the definition of trafficking with international definition.<sup>192</sup>

In Belgium, however, the means are considered as *aggravating factors* in Article 433septies of the Criminal Code, that correspond to the means of the regional human trafficking offence and the aggravating offences required under Article 24 of the Council of Europe Convention on Action against Trafficking in Human Beings.<sup>193</sup>

Article 433septies of the Criminal Code, aggravating circumstances: <sup>194</sup>

*1° when the offence has been committed against a minor;*

*2° when it has been committed in abusing the situation of vulnerability in which a person is due to its precarious or illegal administrative status, its precarious social situation, its age, its pregnancy, a disease, an infirmity or a mental or physical deficiency, in such a way that the person does not have another genuine and acceptable choice to not submit to the abuse;*

<sup>191</sup> Section 145(4) Nationality, Immigration and Asylum Act 2002.

<sup>192</sup> See example given for justification for non-inclusion of means: HC, *Public Bill Committee Modern Slavery Bill [Fourth and Fifth Sitting]*, 4 September 2014, p.15.

<sup>193</sup> See reference to EU Framework Decision in Exposé des motifs du Projet de loi du 14 janvier 2005 modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains, (Doc. Parl. St. Chambre, 2004-2005, DOC 51 1560/001), p. 4; GRETA (2013), *supra* n.1, p.20.

<sup>194</sup> Exposé des motifs du Projet de loi du 14 janvier 2005 modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains, (Doc. Parl. St. Chambre, 2004-2005, DOC 51 1560/001), p.15 Collège des procureurs généraux, *Circulaire n° COL 1/2007 du Collège des Procureurs généraux près les Cours d’appel, Traite des êtres humains - Directive ministérielle relative à la politique de recherches et poursuites en matière de traite des êtres humains* (17 janvier 2007), p. 11.

*3° when it has been committed using, directly or indirectly, fraudulent means, violence, threats or any form of coercion [or by resorting to abduction, abuse of authority or deception];*

*3°bis when it has been committed with the mean of offering or accepting payments or any other advantages to obtain the consent of a person having authority over the victim;]*

*4° when the life of the victim has been put in danger deliberately or due to serious/gross negligence;*

*5° when the offence has caused a disease apparently incurable, a [personal work incapacity of more than four months], the complete loss of an organ or of the use of an organ; or a serious mutilation;*

*6° when the concerned activity constitutes a regular activity;*

*7° when it constitutes an act of participation to the principal or accessory activity of an organisation, and this regardless whether the perpetrator has or has not the quality of leader/director.*

Such an approach deliberately goes beyond the European and international definition of the offence, in order to focus on the effectiveness of criminal proceedings and the protection of victims.<sup>195</sup> The rationale for lowering the threshold of the offence by placing the means as aggravating factors is threefold. First of all, the threshold of proof is already relatively high due to the obligation to identify the existence and knowledge of the purpose of exploitation.<sup>196</sup> Secondly, the means, in particular the abuse of a position of vulnerability, are subject to a variety of interpretations and can lead to an acquittal as it is very often the case that it has not been possible to provide sufficient proof of this constituent element.<sup>197</sup> Thirdly and finally, the requirement of a means element would mean that where the situation was found to be an affront to human dignity i.e. exploitation, it would be contradictory to then reject the premise due to the fact that a means had not been used.<sup>198</sup> Thus, the Belgian domestic legal framework has shifted the focus away from the abuse of the victim, instead targeting the exploitation.<sup>199</sup> This is demonstrated by the Belgian courts referring to the “means” as

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<sup>195</sup> Huberts (2006), supra n.154, p. 10. Adopted by the aforementioned Working Group and supported by the Minister of Justice in the legislative debates; GRETA (2013), supra n.1, p.20.

<sup>196</sup> Huberts & Minet (2014), supra n. 16, p.14.

<sup>197</sup> Huberts (2006), supra n.154, p. 10; Exposé des motifs du Projet de loi du 14 janvier 2005 modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains, (Doc. Parl. St. Chambre, 2004-2005, DOC 51 1560/001), p. 15.

<sup>198</sup> Huberts (2006), supra n.154, p. 11.

<sup>199</sup> Council of Europe, *Action against trafficking in human beings: prevention, protection and prosecution*, Proceedings of the regional seminar in Oslo on 1-2 November 2006, p. 37, cited in: Human rights without frontiers international, *Trafficking in Human*

aggravating factors in relation to *both* the action and purpose elements, in stark contrast to the European and international definition of human trafficking where the use of the means is connected to the action element only.

In 2016, further amendments to the criminalisation of human trafficking were adopted with a view to bringing the domestic law in conformity with regional standards, this led to an extension of the list of aggravating factors to include: kidnapping, deception, abuse of authority, giving or receiving of payments or benefits to allow for a person having control over another person.<sup>200</sup> Notwithstanding, GRETA still has concerns as to the extent to which the construction of the human trafficking offence ‘may lead to confusion with other criminal offences, or to possible difficulties regarding mutual assistance in the anti-trafficking field with countries which have incorporated the means in their own definition of human trafficking and as to the interpretation of Article 4(b) of the Convention concerning victim’s consent.’<sup>201</sup> However, despite this recommendation, the domestic authorities contend that the offence is well-understood and appropriately implemented as there is no evidence of any difficulties in the application of the definition of human trafficking.<sup>202</sup>

In practice, the courts frequently consider at least one of the means as an aggravating circumstance, particularly the abuse of vulnerability (as will be discussed further in Chapter 9).<sup>203</sup> However, it is logical to find this aggravating circumstance at the top of the list given that the original domestic legislation prior to 2005 and the international and regional definitions of human trafficking place a significant emphasis on the abuse of situation of vulnerability.<sup>204</sup> The file study affirms this, with at least one aggravating factor included on the indictment in all cases. The *most common aggravating factor* was an abuse of position of vulnerability (44 cases) with the *most common form of vulnerability* identified by the judges being an illegal administrative situation.<sup>205</sup> In 19 cases, the position of vulnerability by virtue of the illegal

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Beings in Belgium -2007-2008, 4 MAY 2009, p.2; Service Public Fédéral Justice (2011 – 2012), supra n.55, pp.53.

<sup>200</sup> Loi du 31 mai 2016 complétant la mise en œuvre des obligations européennes en matière d’exploitation sexuelle des enfants, de pédopornographie, de traite des êtres humains et d’aide à l’entrée, au transit et au séjour irréguliers, M. B., 8 juin 2016; GRETA (2017), supra n.2, p.8; Myria (2016), supra n.71, pp. 72-74.

<sup>201</sup> GRETA (2013), supra n.1, p.20; GRETA (2017), supra n.2, p.37.

<sup>202</sup> GRETA (2017), supra n.2, p.37; Service Public Fédéral Justice (2011 – 2012), supra n.54, pp.53-54.

<sup>203</sup> GRETA (2013), supra n.1, p.20; Service Public Fédéral Justice (2011 – 2012), supra n.54, pp.47-50.

<sup>204</sup> Service Public Fédéral Justice (2011 – 2012), supra n.53, p.49.

<sup>205</sup> For discussion on link between migration and human trafficking see Vermeulen (2006), supra n.55, pp57-58. The recent findings from FRA research found that vulnerability linked to residence status is the most important risk factor causing or contributing to

administrative status was explicitly included on the indictment. In 17 cases, the *obiter dicta* states that the defendant had abused the position of vulnerability that arose from the precarious or illegal administrative and social situation of the victims. Among these cases, the court also refers to lack of financial resources, social isolation, and dependence upon the defendant. In three cases, the judgment refers to other forms of vulnerability including physical disability (BE15), socially precarious situation (BE32) and financial precariousness (BE42). In 5 cases, the judgment did not make explicit reference to the vulnerability that had been abused. The least common aggravating factor was the commission of an offence against a minor (1 case).

No aggravating factors	0
Frequent activity	16
Abuse of vulnerability	44
Position of power/authority	25
Constitutes an act of participation in the principal or subsidiary activity of an association, whether or not the offender is a leader	5
Against a minor	1
Making direct or indirect use of fraud, violence, threats	5

**Table 10: The occurrence of aggravating factors in the file study of Belgian criminal cases**

In one case (BE17), the court found the defendants guilty of human trafficking, as the two constituent elements had been satisfactorily identified, however, the court dismissed the aggravating factor. The court held that the defendants did not abuse the situation of vulnerability, as i) the victims requested to work for them and ii) the defendants were themselves in an administratively and financially precarious situation and as such did not abuse the position of vulnerability of the victims. The court held that:

*It is not sufficiently established that the defendants abused their authority over A.A., nor that they abused his precarious administrative and social situation in such a way that he had no other real and acceptable choice than to submit to this abuse, all the*

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labour exploitation. In particular more than one third of the workers interviewed identified it in Belgium, see FRA (2019), *supra* n.22, p. 67.

*more that it appears from the file that it is the name A.A. himself who, through the intermediary of the person called A.K., asked to be able to work for the defendants, and that the record reveals that they too were in a precarious administrative and financial situation at the time.*<sup>206</sup>

In Belgium, there are two instances where the judge stated that the 2005 offence consisted of three elements, and not two:

- *Indeed, trafficking in human beings is constituted of 3 elements namely an action (transport, recruitment, accommodation), a means (use of force, constraint, situation of vulnerability, ...) and a purpose (exploitation of prostitution, exploitation of labour, servitude, ...).*<sup>207</sup>
- *It follows that the abuse of a particularly vulnerable situation has proved to be both a constitutive element and an aggravating circumstance since the victims had no other alternative in this case.*<sup>208</sup>

The judicial understanding of the law in these cases is incorrect, the 2005 human trafficking offence only consisted of two constituent elements with the means as aggravating circumstances. Notwithstanding these two anomalies, in future cases, the judiciary makes explicit reference to the correct composition of the offence, requiring first the need to identify the action and purpose elements before considering the means as aggravated circumstances during sentencing.<sup>209</sup>

Finally, the non-inclusion of the means as a constituent element brings into question the extent to which these jurisdictions adhere to the principle of irrelevance of consent.

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<sup>206</sup> BE17 - Unofficial translation, original text: “il n'est pas suffisamment établi que les prévenus ont abusé de leur autorité sur le nommé A.A., ni qu'ils ont abusé de sa situation administrative et sociale précaire de manière telle qu'il n'avait pas d'autre choix véritable et acceptable que de se soumettre à cet abus, ce d'autant plus qu'il ressort du dossier que c'est le nommé A.A. lui-même qui, par l'intermédiaire de la nommée A.K., a demandé à pouvoir travailler pour les prévenus, et que le dossier révèle qu'eux aussi étaient dans une situation administrative et financière précaire à l'époque.”

<sup>207</sup> BE4- Unofficial translation, original text: “En effet, la traite des êtres humains est déterminée par 3 éléments à savoir une action (transport, recrutement, hébergement), un moyen (recours à la force, contrainte, situation de vulnérabilité, ...) et une finalité (exploitation de la prostitution, exploitation du travail, servitude, ...).”

<sup>208</sup> BE5- Unofficial translation, original text: “Il en résulte que l'abus de situation particulièrement vulnérable est avéré tant comme élément constitutif que comme circonstance aggravante dès lors que les victimes n'avaient en l'espèce, aucune autre alternative.”

<sup>209</sup> BE1, BE16, BE20, BE24, BE26, BE29, BE31, BE39.

In Belgium, the principle of irrelevance of consent has been affirmed.<sup>210</sup> However, with its introduction there were fears that it would lead to a flood gate moment, whereby the scope of the offence would be widened to include persons who willingly consented to undignified working conditions in Belgium for a higher salary than in their country of origin. In practice, such a situation has not arisen, which Clesse et al attribute to the diligence of the judiciary in ensuring that the offence of human trafficking is preserved in its strictest terms.<sup>211</sup> Additionally, the recognition of aggravating circumstances in the majority of cases suggests that it would be rare for a judge not to have to consider the impact of such means on the individual's agency.<sup>212</sup> Such an approach is vital to combating and overcoming a tolerance of exploitation – as discussed in Chapter 5. Furthermore, the importance of focusing on the *mens rea* is also necessary so as to avoid social dumping whereby the state is seen to be tolerating or accepting practices that impact on vulnerable workers who can end up in a position of debt-bondage.<sup>213</sup>

In England & Wales, the statute book was silent as to the relevance of consent from 2002-2009 for the offence of human trafficking. Subsequently, the irrelevance of consent to the action but not to the purpose element – contrary to the provision of irrelevance of consent in international and regional definitions where means have been used - is now explicitly stated in **Section 2(2) Modern Slavery Act 2015**. In stark contrast, the irrelevance of consent in Northern Ireland and Scotland is not restricted to the travel but encompasses all acts.<sup>214</sup> As for the irrelevance of consent to exploitation, this issue was raised during the passage of the Bill but to no avail.<sup>215</sup>

#### 1.4. The forms of exploitation: an exhaustive approach with some flexibility?

The Belgian human trafficking offence formally prohibits an exhaustive list of five forms of exploitation: prostitution of others, begging, put (in)to work [*mise au travail*]

<sup>210</sup> Rapport fait au nom du Groupe de travail traite des êtres humains, de Mme DÉSIR, 27 mars 2012, (Doc. parl., Sénat, n° 5-1073/1), p. 23. Huberts & Minet (2014), supra n. 16, p.15. CECLR, Rapport annuel 2009 - traite des êtres humains, 2010, p. 24.

<sup>211</sup> Clesse, Ch.-E., et al, *La traite des êtres humains et le travail forcé*, (Bruxelles: Larcier, 2014), p. 9-10.

<sup>212</sup> Huberts & Minet (2014), supra n. 16, p.16.

<sup>213</sup> Clesse, Ch.-E., et al, *Traité des êtres humains/ Mensenhandel Mensensmokkel*, (Brugge: Die Keure 2010), p.44 & p.56.

<sup>214</sup> Section 1(5) The Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, Section 1(3) Human Trafficking and Exploitation Act (Scotland) 2015.

<sup>215</sup> HL, *Committee [1st sitting]*, 1 December 2014, Cols 1132-1133.

in conditions contrary to human dignity, organ removal and criminal exploitation.<sup>216</sup> Whilst the inclusion of the exploitation of begging extended the scope of exploitation,<sup>217</sup> the formulation of this exhaustive list suggests that the offence is more restrictive than the previous article 77bis, whose unlimited scope meant that certain situations that were not explicitly mentioned could have amounted to a form of constraint or an abuse of vulnerability.<sup>218</sup> The exclusion of the phrase “at a minimum” – contrary to the international and regional definitions - in the **Law of 10 August 2005** and the **Law of the 29 April 2013**, restricts the scope of exploitation to these five situations. Such an exhaustive approach risks the non-inclusion of new forms of exploitation subject to a legislative amendment.<sup>219</sup>

When it comes to labour exploitation, the scope of this form of exploitation is twofold: first it refers to those who put to work [*la mise au travail*] individuals in conditions contrary to human dignity; secondly, it also refers to those who allow/enable putting someone to work [*permettre la mise au travail*], which was not previously criminalised in the Criminal Code.<sup>220</sup> Furthermore, the characterisation of labour exploitation as “conditions contrary to human dignity” leads to a determination of a threshold that implies a minimum level of severity, which is indicative of the fact that the law on human trafficking does not seek to tackle the informal labour market [*travail en noir*].<sup>221</sup> Instead, such a formulation sought to ensure that the domestic law went beyond the minimum standards required of the European legislation at the time (the 2002 Framework Decision<sup>222</sup>) which determined that labour exploitation is considered to include at a minimum forced or compulsory labour or services, slavery and practices similar to slavery.<sup>223</sup>

Furthermore, the inclusion of conditions contrary to human dignity was deemed

<sup>216</sup> Exposé des motifs du Projet de loi du 14 janvier 2005 modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains, (Doc. Parl. St. Chambre, 2004-2005, DOC 51 1560/001), p. 3; NB the forced criminality was added following a request from the Centre pour l'Egalité des chances et la lutte contre le Racisme.

<sup>217</sup> Huberts (2006), supra n.154, p. 7; Exposé des motifs du Projet de loi du 14 janvier 2005 modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains, (Doc. Parl. St. Chambre, 2004-2005, DOC 51 1560/001), p. 5.

<sup>218</sup> Beernaert & Le Cocq (2006), supra n.153, p. 371

<sup>219</sup> Beernaert & Le Cocq (2006), supra n.153, p. 368; Huberts & Minet (2014), supra n. 16, p.21.

<sup>220</sup> Huberts (2006), supra n.154, p. 9.

<sup>221</sup> Exposé des motifs du Projet de loi du 14 janvier 2005 modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains, (Doc. Parl. St. Chambre, 2004-2005, DOC 51 1560/001), p. 19 cited in Beernaert & Le Cocq (2006), supra n.153, p. 371; and Huberts (2006), supra n.154, p. 9; Clesse et al (2014), supra n.211, p. 27.

<sup>222</sup> Council Framework Decision of 19 July 2002 on combating trafficking in human beings, OJ L 203, 1.8.2002, p. 1–4.

<sup>223</sup> Huberts (2006), supra n.154, p. 9; Clesse et al (2014), supra n. 211, p. 27. Conversely the research reveal that the courts never refer to the forms of exploitation listed in regional instruments when determining labour exploitation (see Chapter 9).



necessary to assist with judicial interpretation, where previously, difficulties in the interpretation of abuse of vulnerability led to the non-identification of human trafficking, even where there were indicators of such conduct such as confiscation of identity documents and poor working conditions.<sup>224</sup> Another reason for the focus on the notion of human dignity is that it is a legal term that is known in the Belgian constitution as well as in other areas of domestic law such as social security.<sup>225</sup> However, despite its existence in Belgian law, it is important to note that the concept of human dignity is not legally defined and remains a vague concept.<sup>226</sup> As such Clesse et al note that it is difficult to determine the extent to which it is possible to ‘transform a philosophical imperative into a juridical notion.’<sup>227</sup> The legislative provided further input as to the understanding of the concept of human dignity in Annex 1 of the Directive of 14 December 2006, wherein human dignity is defined as:

*More precisely, violating human dignity means demeaning what characterises the human nature, namely the abilities of body and spirit:*

- *Ability of body: the ability to move, to provide for someone’s own means, to seek treatment... It thus refers to the physical ability to support in a free or equal way someone’s essential means.*
- *Ability of spirit: the social and intellectual abilities available in equal ways within society.*

*If it can be considered that violating human dignity consists of depriving the individual of the exercise of one of these two abilities, it remains to be seen when the threshold of incompatibility with human dignity is breached/crossed.*<sup>228</sup>

Whilst the exact interpretation of economic exploitation with regards to conditions that are contrary to human dignity is left to the judiciary (as we will see in Chapter 9), the legislative provided some rudimentary considerations, as outlined by Huberts:

<sup>224</sup> Huberts & Minet (2014), supra n. 16, p.35

<sup>225</sup> Huberts & Minet (2014), supra n. 16, p.36

<sup>226</sup> Vermeulen (2006), supra n.55, p.18.

<sup>227</sup> Clesse et al (2014), supra n. 211, p. 28. See also ILO (2009), supra n.159, p.59; Kurz (2008), supra n. 160.

<sup>228</sup> Circulaire n° COL 1/2007, supra n.194, annex 1. Unofficial translation, original text: “*Plus précisément, porter atteinte à la dignité humaine, c’est avilir ce qui caractérise la nature humaine, c’est-à-dire, les facultés de corps et d’esprit :- Faculté de corps : la faculté de se mouvoir, de subvenir à ses besoins, de se soigner, ... Il s’agit donc de la capacité physique à subvenir de façon libre ou égale à ses besoins essentiels.- Faculté d’esprit : les facultés intellectuelles et sociales mobilisables de façon égale au sein d’une société.Si l’on peut considérer que porter atteinte à la dignité humaine consiste à priver l’individu de l’exercice de l’une ou de ces deux facultés, reste à savoir à quel moment le seuil d’incompatibilité avec la dignité humaine est atteint.*”

*From the remuneration aspect, an income/salary manifestly not linked with a very important number of working hours effectively worked, eventually without resting day, or the provision of non-remunerated services can be qualified as conditions contrary to human dignity. If the remuneration given is inferior to the average monthly minimum income, as referred to in a collective agreement concluded within the National Labour Council, it would constitute for the trial judge an undeniable indication of labour exploitation. Working conditions contrary to human dignity can equally be established by the activity/work of one or more workers in a working environment manifestly not conform with the norms provided for by the Law of 4 April 1996 relating to the wellbeing of workers when executing their work.*<sup>229</sup>

Subsequent guidance as to the indicators of exploitation have been provided by a Circular of the College of Public Prosecutors [*Collège des Procureurs généraux près les Cours d'appel*], the indicators relate to: displacement, identity and travel documents, working conditions of trafficking victims, income of trafficking victims, accommodation, violation of physical integrity of victims, freedom to move of victims, and links with the country of origin of the presumed victims of trafficking.<sup>230</sup>

Whilst the legislative was keen to ensure a distinction between illegal employment in the context of labour law and economic exploitation in the context of criminal law,<sup>231</sup> labour exploitation is deemed to be understood in an expansive manner, in order to capture future iterations of the phenomenon.<sup>232</sup> However, such a broad understanding does raise interpretative difficulties when it comes to determining the threshold between labour market abuses and conditions that are contrary to human dignity especially ‘in situations that do not present obvious signs of exploitation.’<sup>233</sup>

<sup>229</sup> Huberts (2006), supra n.154, p. 9. Unofficial translation, original text: “Du point de vue de la rémunération, un salaire manifestement sans rapport avec un très grand nombre d’heures de travail prestées, éventuellement sans jour de repos, ou la fourniture de services non rétribués peuvent être qualifiés de conditions contraires à la dignité humaine. Si la rémunération servie est inférieure au revenu minimum mensuel moyen tel que visé à une convention collective conclue au sein du Conseil National du Travail, cela constituera pour le juge du fond une indication incontestable d’exploitation économique. Des conditions de travail contraires à la dignité humaine peuvent également être établies par l’occupation d’un ou plusieurs travailleurs dans un environnement de travail manifestement non conforme aux normes prescrites par la loi du 4 août 1996 relative au bien-être des travailleurs lors de l’exécution de leur travail.”

<sup>230</sup> Collège des procureurs généraux, Circular n° COL 10/2004 du Collège des Procureurs généraux près les Cours d’appel, *Politique de recherches et poursuites en matière de traite des êtres humains – adaptation de la directive du ministre de la justice (COL 12/99)* (30 avril 2004), annex, pp35-38. Circulaire n° COL 1/2007, supra n.194, annex 2, pp4-8.

<sup>231</sup> Clesse et al (2014), supra n. 211, p. 27, Exposé des motifs du Projet de loi du 14 janvier 2005 modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains, (Doc. Parl. St. Chambre, 2004-2005, DOC 51 1560/001), p. 19.

<sup>232</sup> Proposition de loi visant à modifier l’article 433 quinquies du code pénal afin d’étendre la définition de la traite des êtres humains à l’exploitation sexuelle, Doc. Parl. Ch. Repr. Sess. Ord 2010, no 0328/001, p. 4 cited in Clesse et al (2014), supra n. 211 p. 28.

<sup>233</sup> Huberts & Minet (2014), supra n. 16, p.36. See also: Beernaert & Le Cocq (2006), supra n.152, p. 372-374; Clesse et al (2014), supra n. 211 p. 28.

Furthermore, with the entry into force of the Law of 10 August 2005, guidance on the meaning of exploitation in the context of labour confirmed that the interpretation of the concept “contrary to human dignity” should be ‘in accordance with the norms, values and criteria of the European Union and not of the country of origin of the victim at the risk of taking into account a commonly lower standard.’<sup>234</sup> However, commentators such as Beernaert & Le Cocq have queried whether or not such a restrictive approach to human trafficking is sufficient to satisfy the international legal obligations, which requires the prohibition of forced labour, servitude and slavery. This critique such suggests that all forms of forced labour are contrary to human dignity as the latter has a larger material scope and consequently may be the subject of an evolutionary judicial interpretation that could be contrary to the principle of legality.<sup>235</sup> Furthermore, we reiterate the observation by GRETA that the requirement to demonstrate the existence of conditions contrary to human dignity (the exploitation) is contrary to the international definition of human trafficking whereby an action that does not lead to exploitation still constitutes human trafficking due to the intention to exploit.<sup>236</sup>

In order to address these concerns, the Law of 29 April 2013 amended and extended the meaning of economic exploitation to include the work **or services** of a person contrary to conditions of human dignity.<sup>237</sup> The drafters recognised that the addition of services meant that a more evolutionary approach could be adopted allowing for flexibility of the types of exploitation that could be included in the material scope, such as domestic servitude, bogus self-employment and forced surrogacy whilst being in compliance with regional legal obligations.<sup>238</sup>

In England & Wales, the initial introduction of a single **offence for traffic in prostitution (Section 145(4) Nationality, Immigration and Asylum Act 2002)** was restricted to the exercise of control over prostitution by another. However, subsequent

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<sup>234</sup> La Directive du Ministre de la Justice COL 10/04 relative à la politique de recherches et poursuites en matière de traite des êtres humains du 20 avril 2004 cited in Beernaert & Le Cocq (2006), supra n.153, p. 372. Unofficial translation, original text: “il y a lieu de se référer aux normes, valeurs et critères de l’Union européenne et non à ceux des pays d’origine de la victime, sous peine de prendre en compte une norme communément plus basse.”

<sup>235</sup> Beernaert & Le Cocq (2006), supra n.153, p. 372-374.

<sup>236</sup> GRETA (2013), supra n.1, paras 52-53. Also raised by Malpani, R., ‘Criminalising human trafficking and protecting the victims,’ in Andrees, B., & Belser, P., (eds) *Forced Labour: Coercion and Exploitation in the private economy* (New York: Lynne Reiner Publishers, 2009) p.140.

<sup>237</sup> GRETA (2013), supra n.1, p.21.

<sup>238</sup> Rapport fait au nom de la Commission Justice de la Chambre, de MME Daphné DUMERY, 4 mars 2013, (Doc.parl., Chambre, Doc 53- 2607/004), p.10; Clesse (2013), supra n. 111, p.204; Centre fédéral pour l’analyse des flux migratoires, la protection des droits fondamentaux des étrangers et la lutte contre la traite des êtres humains, traite des être humain (2013) supra n.72, p. 40.

iterations led to a wider understanding of human trafficking for sexual exploitation.<sup>239</sup> Nevertheless, labour exploitation was still excluded, until the introduction of the **offence of trafficking for exploitation (Section 4 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004)** which saw a drastic shift in the domestic understanding of exploitation, with an exhaustive list of four more forms of exploitation.<sup>240</sup> Accordingly, the combination of the two trafficking offences was deemed sufficient to ‘meet the minimum requirements of the UN protocol.’<sup>241</sup>

In 2015, **Section 3 Modern Slavery Act 2015** outlines the meaning of exploitation in the context of human trafficking as a categorical list of seven forms of exploitation, namely: slavery, servitude and forced or compulsory labour, sexual exploitation, removal of organs etc, securing services etc by force, threats or deception, and securing services etc from children and vulnerable persons.

The legislative developments pertaining to the human trafficking offence have resulted in an increased recognition of the scope and scale of labour exploitation. Nevertheless, two aspects of the Modern Slavery Act 2015 require further attention. First of all, whilst the statute does not explicitly refer to the provision or request of services such as forced begging or criminal activities,<sup>242</sup> the Government contend that subjecting someone to “force, threats or deception” to induce them to provide “services” or “benefits of any kind” is sufficient to cover these forms of exploitation as well as any new forms of exploitation that may emerge.<sup>243</sup>

Second, another issue of contention that arose during the drafting of the Modern Slavery Act was the discrepancy between a person who was subjected to exploitation listed in Section 3 but was not trafficked in accordance with Section 2. In particular, could an individual be deemed to have sufficient access to redress under the Section 1

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<sup>239</sup> Sections 57-59 Sexual offences act 2003.

<sup>240</sup> GRETA(2012), supra n.5, p.23; unfortunately, no pre-legislative/ bill passage documents etc that demonstrate the choice of wording/forms of exploitation in particular sub-sections c and d; NB the draft bill did not list four forms of exploitation, simply three, no request or inducement to something, having been chosen on the grounds of personal characteristics.

<sup>241</sup> House of Commons Library (2003), supra n. 163, p.87.

<sup>242</sup> See Amendment 35 in HC, *Public Bill Committee Modern Slavery Bill [Fourth and Fifth Sitting]*, 4 September 2014, Cols 123-156, p.14.

<sup>243</sup> Modern Slavery Act 2015 (c.30) Explanatory Notes section 3(5); Modern Slavery Bill (HC Bill 8), 2014-2015 (as introduced in the House of Commons), 10 June 2014, Explanatory notes.

This would include forcing a person to engage in activities such as begging or shop theft. It is not necessary for this conduct to be a criminal offence. HC, *Public Bill Committee Modern Slavery Bill [Fourth and Fifth Sitting]*, 4 September 2014, Cols 123-156, pp.17-19.

standalone offences of exploitation since they are limited to three forms of exploitation listed in Section 3(1), but not the other forms of exploitation listed in Section 3(2)-(6).

<sup>244</sup> Ultimately, it was stated that the provisions in Section 1 were sufficiently broad enough to cover scenarios where a person who was not trafficked but had been exploited in accordance with one of the forms of exploitation listed in Sections 3(2)-(6):

*Under clause 1, where you have slavery, servitude or forced labour, if somebody is forcing them to beg, you might say that that could be forced labour or compulsory labour, or you may be able to do it under some other common-law offences and statutes that we have.*<sup>245</sup>

However, such a position is of particular concern to certain groups of potential victims: namely, children and those who are exploited for the purposes of benefit fraud. For child victims, especially in light of the absence of (a) specific provision(s) that tackled child trafficking/exploitation, this was a concern since ‘some of the things that children experience as exploitation do not fall neatly into that particularly strong definition [of slavery, servitude and forced labour].’<sup>246</sup> The same principle applies to those who are being exploited for the purposes of benefit fraud etc, and do not *per se* have their labour or services exploited.<sup>247</sup> Suggestions to close this gap by adding “or other forms of exploitation” (amendment 36 & 38)/“and/or any of the types of exploitation listed in section 3 of this Act” (amendment 37) to the wording of the clause that prohibited slavery, servitude and forced or compulsory labour were rejected.<sup>248</sup> The principle objection being that the standalone offences would then be unacceptably broadened in scope.<sup>249</sup> As a result, the pre-legislative focus on the issue of human trafficking,<sup>250</sup> resulted in the presentation of exploitation in the context of human trafficking as a categorical and exhaustive rather than definitional. Consequently, the apparent deference to the understanding of the Article 4 jurisprudence provides

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<sup>244</sup> See Amendment 29 in HC, *Public Bill Committee Modern Slavery Bill [Second And Third Sitting]*, 2 September 2014, Cols 45-122, p. 6.

<sup>245</sup> See evidence given by Alison Saunders, Director of Public Prosecutions in HC, *Public Bill Committee Modern Slavery Bill [First Sitting]*, 21 July 2014, Cols 145-206, p. 5.

<sup>246</sup> House of Commons (2014), *supra* n. 178, p. 20.

<sup>247</sup> See also in the Netherlands, where compelled to undertake mobile phone contracts was considered to amount to human trafficking in Rijken, C., (ed.) *Combating trafficking in human beings for labour exploitation* (Wolf Legal Publishers, 2011), p. 506.

<sup>248</sup> HC, *Notices of Amendments as of 2 September 2014, Consideration of Bill Modern Slavery Bill*, 2 September 2014, P.1.

<sup>249</sup> HC, *Public Bill Committee Modern Slavery Bill [Second And Third Sitting]*, 2 September 2014, Cols 45-122, p. 16.

<sup>250</sup> Craig, G., ‘Human Trafficking and the UK Modern Slavery Bill’, (2015) *Social Inclusion* 3(1), 136-139, p.137; and Craig (2017), *supra* n.136, p.20.

flexibility and allows for the evolution of the understanding of exploitation but at the same time does not always provide clarity in the domestic context. This issue very much comes to the fore in England & Wales, as will be demonstrated in the following section when discussing the formal and substantive criminalisation of the standalone offences and the significant Article 4 jurisprudence that heavily domestic judicial precedent.

## **2. Slavery, servitude and forced or compulsory labour in England & Wales: the legal framework**

In this section we will consider the legislative development of standalone labour exploitation offences in England & Wales only, as there are no standalone offences of slavery, servitude and forced or compulsory labour in the Belgian criminal law.<sup>251</sup>

Before shifting the focus onto England & Wales, we will, however, briefly acknowledge reference to slavery and enslavement in Belgian law, that is made explicit in the context of international humanitarian law and crimes against humanity.<sup>252</sup> The Belgian authorities consider that the current legal framework, as outlined in the *travaux préparatoires* of the Criminal Code, to be sufficient to comply with the minimum obligation imposed by international instruments, which refer to forced labour or services, slavery or practices similar to slavery, and servitude.<sup>253</sup> Whilst Belgian law is silent as to the meaning of exploitation in relation to the standalone offences, one reference is made to the meaning of “enslavement” in a 2007 Ministry of Justice Directive which states that ‘enslavement means the act of reducing a person to servitude, slavery or extreme dependency.’<sup>254</sup> The Directive further states that the notions of slavery and debt bondage are defined with reference to the Slavery Convention of 1926 and the Supplementary Convention on the abolition of slavery, the slave trade, and institutions and practices similar to slavery of 1956.<sup>255</sup> In the absence of standalone offences in Belgium, the remainder of this section will solely consider the criminalisation, the judicial application and clarification of the composition and ingredients of the standalone offences in England & Wales.

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<sup>251</sup> BE13, BE41, BE44.

<sup>252</sup> Article 136 ter-quater, Criminal Code, Book II, Title I, Chapter III.

<sup>253</sup> GRETA (2013), *supra* n.1, p.21; GRETA (2017), *supra* n.2, p. 38.

<sup>254</sup> Circulaire n° COL 1/2007, *supra* n.194, annex 1. annex 1, p.2.

<sup>255</sup> Circulaire n° COL 1/2007, *supra* n.194, annex 1. annex 1, p. 2.

## 2.1. Criminalising standalone offences in domestic law: from political resistance to proclamations of global flagship status<sup>256</sup>

The introduction of the standalone offences into domestic criminal law was a process which was initially met with reluctance and trepidation.<sup>257</sup> Whilst the signature and the ratification of the Council of Europe Anti-trafficking Convention led to a ‘harmonisation of UK legislation with other European countries,’ the domestic criminal law was restricted since human trafficking (arranging or facilitation of travel) was a pre-condition for any prosecution involving labour exploitation.<sup>258</sup> Such a position was rectified in a last minute House of Lords amendment to the Draft Coroners and Justice Bill 2009 (7 days prior to Royal Assent),<sup>259</sup> in recognition of the inadequacy of the existing law whereby criminalisation of trafficking ‘does not apply where a person is subjected to forced labour conditions within the UK without having been trafficked.’<sup>260</sup> Resistance to the further criminalisation suggested that existing legislation - trafficking for labour exploitation, complicity in such trafficking, assault, false imprisonment, blackmail, harassment and a range of employment-related offences - was sufficient to comply with Article 4 obligations to protect people from slavery, servitude or forced or compulsory labour.<sup>261</sup> Interestingly, the same argument arose in relation to the Modern Slavery Bill, where evidence heard by the Select Committee revealed ‘that [the prosecution] numbers are low, but “we get them on something else.”’<sup>262</sup> We interpret such an assertion to mean that despite the provision of standalone offences, a gap in the current law on labour exploitation exists, particularly in situations where the threshold of the existing offences is not met.

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<sup>256</sup> Home office, *Home Secretary speech on modern slavery*, Speech given by the Home Secretary on Modern Slavery on 4 December 2013 at Reuters Conference, Published 6 December 2013; Prime Minister’s Office, *PM speech to UNGA on modern slavery: ‘behind these numbers are real people’*, Published 27 December 2017.

<sup>257</sup> See reference to the Government’s position in *C.N. v. United Kingdom*, 13 November 2012, Application No. 4239/0, paras 56-58.

<sup>258</sup> Balch (2012), *supra* n.165, p. 11; Skrivankova, K., *Between decent work and forced labour: examining the continuum of exploitation*, JRF programme paper (November 2010), p. 8.

<sup>259</sup> HL, *Public Bill Committee Coroners and Justice Bill [6th sitting]* House of Lords 9 July 2009, Col 851; Amendment 15 in HL, *Public Bill Committee Coroners and Justice Bill [3rd Sitting]* House of Lords 28 October 2009, Col 399. The Bill as introduced did not refer to criminalization of labour exploitation offences, nor did it refer to any amendments to the existing trafficking law, Coroners and Justice Bill, Bill 9, 54/4.

<sup>260</sup> HL, *Public Bill Committee Coroners and Justice Bill [6th sitting]* House of Lords 9 July 2009, Col 852; See reference to Matrix Chambers members in HL, *Short Debate: Immigration: Migrant Workers* 27 October 2009 Vol 713, Col 1153.

<sup>261</sup> See reference to Lord Bach in in HL, *Short Debate: Immigration: Migrant Workers* 27 October 2009 Vol 713, Col 1144; HL, *Public Bill Committee Coroners and Justice Bill [3rd Sitting]* House of Lords 28 October 2009, Col 1181.

<sup>262</sup> HC, *Public Bill Committee Modern Slavery Bill [Fourth and Fifth Sitting]*, 4 September 2014, Cols 123-156, p.7.

The standalone offences of slavery, servitude and forced or compulsory labour introduced in **Section 71 Coroners and justice Act 2009** were subsequently repealed by **Section 1 Modern Slavery Act 2015**, disconnecting exploitation from the trafficking process and immigration framework.<sup>263</sup>

#### **Section 71 Coroners and justice Act 2009**

*(1) A person (D) commits an offence if—*

*(a) D holds another person in slavery or servitude and the circumstances are such that D knows or ought to know that the person is so held, or*

*(b) D requires another person to perform forced or compulsory labour and the circumstances are such that D knows or ought to know that the person is being required to perform such labour.*

*(2) In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention (which prohibits a person from being held in slavery or servitude or being required to perform forced or compulsory labour).*

#### **Section 1 Modern Slavery Act 2015**

*(1) A person commits an offence if—*

*(a) the person holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is held in slavery or servitude, or*

*(b) the person requires another person to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform forced or compulsory labour.*

*(2) In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention.*

*(3) In determining whether a person is being held in slavery or servitude or required to perform forced or compulsory labour, regard may be had to all the circumstances.*

*(4) For example, regard may be had—*

*(a) to any of the person's personal circumstances (such as the person being a child, the person's family relationships, and any mental or physical illness) which may make the person more vulnerable than other persons;*

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<sup>263</sup> Percival (2013), *supra* n. 165, p.3.



*(b) to any work or services provided by the person, including work or services provided in circumstances which constitute exploitation within section 3(3) to (6).*

*(5) The consent of a person (whether an adult or a child) to any of the acts alleged to constitute holding the person in slavery or servitude, or requiring the person to perform forced or compulsory labour, does not preclude a determination that the person is being held in slavery or servitude, or required to perform forced or compulsory labour.*

Overall, there are no significant differences in the formulation of the criminal offences as introduced in 2009 and those that were amended in 2015. There is one significant distinction in the 2015 version, wherein the principle of irrelevance of consent was explicitly introduced in the **Section 1(5) Modern Slavery Act 2015**, prior to this, the irrelevance consent of the individual was not explicitly stated in statute. Indeed, the provision was not included in the first version of the draft bill when introduced into parliament. Subsequent efforts were made to introduce the irrelevance of consent to the standalone offences in order to clarify that ‘a person may still be in slavery, servitude or forced or compulsory labour even where physical escape is practically possible, recognising that people can be held in slavery by psychological means as well as physical restraint.’<sup>264</sup> Of course, such an interpretation of the irrelevance of consent has subsequently been confirmed in the case of *Chowdury*, whereby the European Court affirmed that restriction is not a *sine qua non* condition for forced labour (Chapter 3). The proposed amendments not only sought coherence with the same provision in the human trafficking offence but also the issue of consent was considered to be problematic when it comes to the identification, investigation and prosecution where it appears that a person has consented to their situation.<sup>265</sup> The explicit reference in the statute to the irrelevance of consent ‘makes it clear for police officers, courts, lawyers and jurors that slavery, servitude and forced labour are complex situations, and that numerous factors can lead a person to consent to exploitation without necessarily meaning that the exploitation is not taking place.’<sup>266</sup>

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<sup>264</sup> See Amendment 29 HC, *Public Bill Committee Modern Slavery Bill [Second And Third Sitting]*, 2 September 2014, Cols 45-122, p. 7-8; See Amendment 136 in HC, *Notices of Amendments given up to and including Thursday 30 October 2014 Consideration of Bill Modern Slavery Bill, As Amended*, 30 October 2014; See Amendment 7 in HC, *Modern Slavery Bill, Marshalled List of Amendments to be moved in Committee*, 28 November 2014; HC, *Modern Slavery Bill, Second Reading*, 8 July 2014, Col 180; HC, *Report stage*, 4 November 2014, Cols 720-721; HL, *Committee [1st sitting]*, 1 December 2014, Col 1138.

<sup>265</sup> See reference to evidence from Riel Karmy-Jones, Peter Carter QC and Hope for Justice in HL, *Committee [1st sitting]*, 1 December 2014, Cols 1132-1133; HC, *Report stage*, 4 November 2014, Cols 710-717; See Amendment 29 in HC, *Public Bill Committee Modern Slavery Bill [Second And Third Sitting]*, 2 September 2014, Cols 45-122, p. 7-8. For previous problems with acquittals due to voluntary nature of entry into exploitative relationship, Craig Kinsella, see HC, *Modern Slavery Bill, Second Reading*, 8 July 2014, Col 180.

<sup>266</sup> HL, *Committee [1st sitting]*, 1 December 2014, Cols 1132-1133.

Such factors can include, psychological barriers, threats to the individual or their family, fear of authorities, debt bondage, dependency on exploiters for subsistence needs.

Other than the inclusion of the irrelevance of consent, the legislative's position, when it comes to a lack of willingness to provide further explanation as to the meaning and scope of the standalone offences, is testament to their similarity. Instead, the explanatory notes to both statutes cite the full provision of Article 4 of the ECHR and stipulate that the material scope and application of the offences is to be construed from the case law of the European Court of Human Rights as interpreted by judges in domestic case law, sentencing guidelines and legal guidance from the prosecuting authorities.<sup>267</sup> The principal reasons for this are threefold: i) to seek clarity of a complex subject; ii) to afford discretion to interpret statute as is the tradition in a common law system in accordance with case law changes and; iii) to allow 'flexibility and effectiveness over time' so as to ensure that the domestic law reflects developing international standards over time.<sup>268</sup> Notwithstanding, Stoyanova contests a simplistic reproduction of Article 4 in national criminal legislation and instead asserts a preference for domestic legislation to be clear as to what is meant by further defining the offences.<sup>269</sup> This is particularly of relevance when Article 4 itself does not further define the key terms of slavery, servitude and forced labour, instead it simply lists certain activities that do not fall within these terms. Furthermore, whilst awareness of the intricacies of the European case law on the part of judges is a reasonable requirement, it is less practical for prosecutors and police officers to keep abreast of developments, as 'a result the lack of definitions in the [law] could lead to front-line

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<sup>267</sup> HL, *Public Bill Committee Coroners and Justice Bill [3rd Sitting]* House of Lords 28 October 2009, Col 1182; HL, *Public Bill Committee Coroners and Justice Bill [3<sup>rd</sup> reading]* House of Lords 5 November 2009, Col 400; GRETA(2012), *supra* n.5, p.25; The Coroners and Justice Act 2009 (c.29) Explanatory Notes, s71; Modern Slavery Act 2015 (c.30) Explanatory Notes, s1. See also Northern Ireland The Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015; Scotland The Human Trafficking and Exploitation Act (Scotland) 2015 in Home Office Analysis and Insight (2017), *supra* n.53, p. 2.

<sup>268</sup> HL, *Public Bill Committee Coroners and Justice Bill [3rd Sitting]* House of Lords 28 October 2009, Col 1182; HC, *Public Bill Committee Modern Slavery Bill [Second And Third Sitting]*, 2 September 2014, Cols 45-122, p. 12.

<sup>269</sup> Stoyanova, V., 'Article 4 of the ECHR and the obligation of criminalizing slavery, servitude, forced labour and human trafficking', (2014) *Cambridge Journal of International and Comparative Law* 3(2), 407-433, p. 439-440. For instance, Stoyanova suggests that the action of "holding" another person in slavery should also be extended to "Reducing/rendering" another in slavery so as to capture those who acts as agents in the provision of labour, and not just the subcontractors, who on the existing description of the offence would be the principle offender; HL, *House of Commons Joint Committee on the Draft Modern Slavery Bill Report session 2013-14*, HL Paper 166, HC 1019, Published on 8 April 2014, p.45; See Amendment 30 in HC, *Public Bill Committee Modern Slavery Bill [Second And Third Sitting]*, 2 September 2014, Cols 45, p. 6-7.

police officers or prosecutors failing properly to identify particular circumstances as falling within the scope of the offence.’<sup>270</sup>

Whilst the aim of legislative reform was to increase prosecutions and the application of more stringent sentences by providing better understanding of labour exploitation, the meaning of these offences was not given the same attention as to the meaning of exploitation in the context of human trafficking; to the detriment of the standalone offences.<sup>271</sup> This can be deduced from the different versions of the Bill, where the composition of the offences – largely - remained unchanged.<sup>272</sup> Since space was not given to elaborating the clarification of the material scope and meaning of the standalone offences during the legislative process, the courts and the judiciary remain on the frontline of determining exactly what is meant by labour exploitation in the context of slavery, servitude and forced or compulsory labour.

## **2.2. Interpreting the standalone offences ‘in accordance with Article 4 of the Human Rights Convention’**

As we discussed in the previous chapter (Section 4), the role of the judge is to ensure that the jury understands the concepts and the relevant applicable law. As we have shown above, the formal criminalisation failed to further clarify the material scope of the standalone offences, simply stating that they had to be ‘construed in accordance with Article 4 of the Human Rights Convention.’<sup>273</sup> The impact of this is clear from the file study, where we see that the introduction of the standalone offences meant that judges were ‘face[d] with a novel type of prosecution, with only Strasbourg jurisprudence to guide [them].’<sup>274</sup> Significantly, the domestic courts did not look to other sources for guidance, such as international law and case law and guidance from the ILO. Thus, first instance judges were at times found to leave the jury with a lack of clarity, which ultimately led to a dilution of the law that was subsequently denounced on appeal. For instance, UK1 was sent to appeal leading to a highly significant Court of Appeal judgment in *R v SK* [2011] EWCA Crim 1691. The role of the trial judge’s

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<sup>270</sup> See Amendment 30 in HC, *Public Bill Committee Modern Slavery Bill [Second And Third Sitting]*, 2 September 2014, Cols 45, p. 6-7.

<sup>271</sup> Craig (2017), *supra* n.136, p.20; Craig (2015), *supra* n.250, p.137.

<sup>272</sup> Except for instance introduction of irrelevance of consent, Clause 1, Modern Slavery Bill (HL Bill 69), 2014-15 (as amended in Committee), 11 December 2014.

<sup>273</sup> Section 71(1) Coroners and Justice Act 2009; Section 1(2) Modern Slavery Act 2015.

<sup>274</sup> *R v SK* [2011] EWCA Crim 16, para 47 (UK1) and UK5.

handling of the definition of the standalone offences was assessed, wherein the appellate court held that:

*We do not think that, when read fairly as a whole, the judge's summing-up provided the jury with a proper definition of exploitation for the purposes of section 4 of the 2004 Act. In describing the ingredients of the offence, the judge did not identify and explain the relevant core elements of Article 4. In our judgment, he focused too much on the economics of the relationship between the appellant and the complainant, thus diluting the test the jury had to apply to one appropriate to an employment law context but not strong enough to establish guilt of the criminal offence with which the appellant was charged. The economic context was not irrelevant. Germane as it was to the issue of exploitation, however, the alleged failure of the appellant to remunerate the complainant at, or anywhere near, the level of the national minimum wage was not determinative of her guilt. What the jury had to concentrate on in this case was not the fact that the complainant was paid "a mere pittance" or an "exploitative" wage, but whether, when the appellant arranged for the complainant to come to the United Kingdom, she had intended to exploit her in such a way as would violate her rights under Article 4. This was not a legal issue, but a question of fact. It did not entail the making of a value judgment about "the standards expected of employers towards their employees in this country wherever they may come from."*<sup>275</sup>

In light of the lack of proper engagement with Article 4 of the ECHR, the Court of Appeal judgment in *R v SK* [2011] EWCA Crim 1691 provides invaluable clarity in terms of outlining the regional interpretations of the standalone offences setting significant precedent for future jurisprudence.<sup>276</sup> Not only, does the Appeal judgment emphasise that the formal and substantive prohibition of standalone labour exploitation offences adheres to the regional understanding outlined in Article 4 of the ECHR, but the file study reveals that subsequent decisions both at first instance and on appeal have maintained the connection with the *Siliadin* judgment. Judicial references to slavery in the file study are based on the understanding provided by the European Court in *Siliadin*, that 'the essence of the concept of "slavery" is treating someone as belonging to oneself, by exercising some power over that person as one might over an animal or

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<sup>275</sup> *R v SK* [2011] EWCA Crim 1691, para 44 (UK1).

<sup>276</sup> *R v SK* [2011] EWCA Crim 1691 (UK1); *R v Connors [Luton]* [2013] EWCA Crim 368 (UK4); *R v Connors [Bristol]* [2013] EWCA Crim 324 (UK5); *Attorney General's Reference (Nos 146 and 147 of 2015) (Edet)* [2016] EWCA Crim 347 (UK15); *R v Joyce* [2017] EWCA Crim 337 (UK17); *Attorney General's Reference (No.35 of 2016) (R. v Rafiq (Mohammed))* [2016] EWCA Crim 1368 (UK19).

an object.’<sup>277</sup> Again, as with slavery, the judiciary followed the definition of servitude as provided by the ECtHR in *Siliadin*, that ‘the essence of the concept of “servitude” is one person's obligation to provide services to another, an obligation imposed by the use of coercion.’<sup>278</sup> The Court of Appeal reaffirmed the understanding of servitude “as a particular serious form of denial of freedom”<sup>279</sup> requiring the following three elements: the obligation to provide work or services through the use of coercion; the obligation to provide accommodation on premises; and the impossibility of changing status.<sup>280</sup> The judiciary distinguish forced or compulsory labour from slavery and servitude as it is not a condition or status (UK4). The test for forced or compulsory labour consists of two stages: the provision of work or services under menace of penalty where the work is undertaken involuntarily.<sup>281</sup>

The *R v SK* [2011] EWCA Crim 1691 judgment attributes the material scope of the standalone offences to a “hierarchy of denial of personal autonomy,” with forced labour as the least serious and slavery as the most severe form of exploitation:

*In descending order of gravity, therefore, “slavery” stands at the top of the hierarchy, “servitude” in the middle, and “forced or compulsory labour” at the bottom.*<sup>282</sup>

The categorisation and hierarchical understanding of exploitation in *R v SK* has been affirmed and applied in subsequent cases analysed in the file study.<sup>283</sup> In addition, the Court of Appeal in *R v SK* ruled that the “concepts are not mutually exclusive,”<sup>284</sup> which is an interpretation consistent with European and international law and academic scholarship.<sup>285</sup> Such recognition of the possibility of duality of circumstances requires consideration when it comes to the presentation of the offences on the indictment. For example, in some instances, the offences sit on the indictment in parallel: forced or compulsory labour **and** servitude (UK5, UK22), whereas in other cases, the offences are explicitly in the alternative: forced or compulsory labour **or** servitude (UK4, UK6,

<sup>277</sup> *R v SK* [2011] EWCA Crim 1691, para 39. Applied by the judges in UK1, UK4, UK5, UK6, UK12, UK23.

<sup>278</sup> *R v SK* [2011] EWCA Crim 1691, para 39. Applied by the judges in UK1, UK4, UK5, UK6, UK12, UK23.

<sup>279</sup> *R v SK* [2011] EWCA Crim 1691, para 22 citing para 123 of *Siliadin*.

<sup>280</sup> *R v SK* [2011] EWCA Crim 1691, para 22 citing para 123 of *Siliadin*. Applied by the judges in UK4, UK5, UK6, UK7, UK12, UK22, UK23, UK30.

<sup>281</sup> UK4, UK5, UK6, UK12, UK21, UK22, UK23

<sup>282</sup> *R v SK* para 24.

<sup>283</sup> UK4, UK5, UK9, UK12, UK17, UK23, UK25, UK28, UK30.

<sup>284</sup> *R v SK* para 40, also cited in UK5.

<sup>285</sup> Allain, J., *Slavery in international law of human exploitation and trafficking*, (Leiden: Martinus Nijhoff Publishers, 2013), p.144.

UK25, UK30). Similarly, the description of the offences sometimes leads to conflation suggesting that the distinction between offences is not so clear cut. For example, in UK9, whilst the hierarchical categorisation was affirmed, the distinction between forced labour and servitude was not always clearly presented by legal counsel:

*Many of the elements of servitude are present, although the Crown recognises that they were convicted in relation to forced labour and not servitude. but the crown makes it clear that the crown's contention is that although this is not a case of servitude, for the reasons I have just given, this is the crown say at the top end of forced labour.*<sup>286</sup>

By virtue of the absence of a general offence of exploitation, forced or compulsory labour constitutes the threshold of exploitation in situations where there is no human trafficking. As a result, when determining the threshold of exploitation, it is important to consider the scope of such a hierarchy, especially where the definitional focus on the three forms of exploitation under Article 4 is extremely narrow, and excludes the other forms of exploitation that are applicable to the human trafficking offence (see Section 2.4).

The domestic adherence to *Siliadin* must however be put into question as it is still very prevalent in the later cases in the file study. We suggest that it is vital for courts to ensure that the domestic application of these offences evolves in accordance with new and emerging case law. For instance, in UK12, servitude and forced labour were defined as a denial of geographic freedom. Whilst such an interpretation cannot necessarily be contested at the time of the case (2014), it is important to note that this is now a restrictive interpretation in light of the subsequent *Chowdury* case where it was confirmed that forced labour did not require a deprivation on the freedom of movement.<sup>287</sup> Acknowledging the low number of criminal cases in first instance, let alone in the appellate courts, we believe that trial judges must nevertheless remain *au fait* with current regional developments.

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<sup>286</sup> UK9 – Prosecution argument at Sentencing hearing, 23.10.13.

<sup>287</sup> *Chowdury and others v. Greece*, 30 March 2017, Application no. 21884/15, para 123.

### 3. Concluding Remarks

In this chapter, we have discussed the legislative evolution of the criminal offences that prohibit labour exploitation in England & Wales and Belgium. Despite both jurisdictions initially making a connection between human trafficking and (irregular) immigration, there has been a shift away from immigration law towards criminal law. In Belgium, human trafficking became a separate human trafficking offence in Criminal Code putting an end to the conflation with the smuggling offence. In England & Wales, labour exploitation was originally prohibited in immigration law as part of the human trafficking offence, but then extended to include standalone offences and trafficking in criminal law.

The shift away from immigration law when tackling labour exploitation in both jurisdictions is to be welcomed, as it ensures that the focus of efforts is on tackling the actual exploitation. Furthermore, it demonstrates an increased recognition, not only of the phenomenon but also of its impact on EU nationals and British and Belgian nationals. For instance, in Belgium, it appears that Belgian authorities have paid greater attention to the detection and identification of victims of human trafficking among Belgian and EU citizens.<sup>288</sup> In England & Wales, since the enactment of Modern Slavery Act 2015, the legislation is being used as a springboard for domestic issues such as homelessness and county lines.<sup>289</sup> Nevertheless, it is important to ensure that (irregular) third country nationals who are at risk of exploitation are afforded the same attention as EU nationals, and their access to justice is not restricted due to their (often irregular) migration status.

With these observations in mind, there are a number of points for further consideration, when seeking to ensure that the handling of exploitation in criminal law is effective.

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<sup>288</sup> GRETA (2017), *supra* n.2, p.24.

<sup>289</sup> Independent Anti-slavery Commissioner, *Understanding and Responding to Modern Slavery within the Homelessness Sector*, January 2017; Home Office, *Modern Slavery and Homelessness conference 2018*, (October 2018); Independent Anti-Slavery Commissioner, *County Lines: The children forced to sell drugs* (October 2017 National Crime Agency, *Latest threat update estimates at least 720 County Lines drug dealing lines*, 28 November 2018; Crown Prosecution Service, *County lines drug-dealer jailed under modern slavery laws*, 4 October 2018; HM Government (21 March 2019), *supra* n.102, p.9-10.

Firstly, the **“domestic” articulation of the human trafficking offences is fragmented** in both jurisdictions as the means are not recognised as constituent elements (Section 1.4); in Belgium, labour exploitation is not articulated in accordance with the international and European (both Council of Europe and EU) legal standard (Section 1); in England & Wales, despite significant pre-legislative efforts to seek closer alignment with supranational definitions, the action element of the trafficking offences is restricted to the arranging or facilitation of travel (Section 1.1).

Secondly, the **human trafficking offence is prioritised in criminal law**. In both jurisdictions, the choice of tackling labour exploitation through criminal law led to the prioritisation of the human trafficking offence. In Belgium, this is exemplified by the restriction of labour exploitation to human trafficking related offences and the non-recognition of standalone offences (Section 2). In England & Wales, this point is exemplified by the inclusion of broader meaning of exploitation in the human trafficking offence (Section 1.4).

Thirdly, **the scope of exploitation is broadly understood and requires further clarification to guard against confusion**. Both jurisdictions demonstrated that despite having an exhaustive and categorical approach to the forms of exploitation, these are in certain instances so broadly understood that there is no further insight into the meaning of exploitation as a concept (Section 1.4).

Taking these conclusions into account the following chapters continue to investigate how the judiciary interpret these criminal law provisions prohibiting labour exploitation and the extent to which the fragmented nature of the criminal legal framework impacts on their interpretation. The analytical framework developed from the legal analysis in Part I and the theoretical analysis in Part II will be the benchmark for the analysis and the chapter will discern the extent to which the judicial interpretation of exploitation helps to clarify the legal contours of this concept.



## **CHAPTER 9 – The judicial interpretation of the material scope of labour exploitation in Belgium and England & Wales**

### **0. Introduction and structure of the chapter**

Whilst Chapter 8 has shown that the domestic criminalisation of labour exploitation has very different legal bases, very similar concepts are grappled with when determining the *existence or the nature* of the exploitation. As in Chapter 8, this chapter will continue to use the findings of the file study of criminal cases from 2010-2017 to analyse the judicial interpretation of the nature of exploitation. Unlike Chapter 8, where both the legislative and judicial approaches were analysed, this chapter will solely focus on the judicial interpretation of exploitation.<sup>290</sup>

In light of a very limited evidence base of the impact of the criminal justice response that emphasises prosecution and the role of the court in interpreting the international and regional definitions, we can see the added value of the jurisprudence analysis of two national legal orders.<sup>291</sup> Furthermore, in many instances there is not yet

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<sup>290</sup> A note on semantics. In the present chapter when reference is made to the judiciary, the courts or judges, this is with direct reference to the file study sample and does not seek to infer a sweeping generalisation as regards all members of the judiciary in the jurisdictions subject to analysis. Where possible, findings from the file study are corroborated with literature and policy in the respective countries.

<sup>291</sup> Esser, L.B., & Dettmeijer-Vermeulen, C.E., 'The Prominent Role of National Judges in Interpreting the International Definition of Human Trafficking' (2016) *Anti-trafficking Review*, Issue 6, 91-105, p. 91.

a critical mass of case law in light of the very recent changes to domestic jurisdictions and where case law exists it predominantly focuses upon human trafficking for sexual exploitation.<sup>292</sup> A limitation of the focus on the criminal justice response is that the structural factors that contribute to exploitation – poor workers’ rights, susceptibility to exploitation in certain sectors, labour protection fragmented or non-existent, focus on restrictive immigration – are not addressed. However, it is hoped the analysis of the material scope of labour exploitation by the courts will contribute to a shift towards a broader handling of exploitation that will require realignment with other areas of law, beyond the criminal justice sphere.

As demonstrated in Chapter 8, severely exploiting the labour of others is deemed to be sufficiently serious that it is prohibited in criminal law. As a result, in both jurisdictions, the judiciary assert that the behaviour must amount to criminal acts, and not just violations of employment laws (UK1), or the Belgian Social Criminal Code.<sup>293</sup> In a similar vein, the Belgian cases further emphasised the need to recognise the “subtle distinction” (BE5) between exploitation and illegal working, with the latter not always amounting to exploitation. A similar discussion also arises when determining a distinction between abuse and exploitation, wherein the former is not serious enough to amount to criminal conduct.<sup>294</sup> The articulation of such distinctions is not always clear cut. A certain amount of interpretative assistance has been provided in the *travaux préparatoires* of the Law of 5 April 2013, on the basis of indicators that refer to social criminal law. However, the possibility of making a clear distinction between illegal employment as mere violations of social criminal law and human trafficking for the purposes of labour exploitation is still put into question, as Clesse et al ponder: ‘*How to distinguish between exploitation and undeclared work? By looking for an attack on human dignity. How to establish this infringement? By searching for offenses of social criminal law.*’<sup>295</sup>

<sup>292</sup> Gallagher, A., ‘Editorial: The Problems and Prospects of Trafficking Prosecutions: Ending impunity and securing justice’, (2016) *Anti-trafficking Review* Issue 6, 1-5, pp. 4-5.

<sup>293</sup> BE29, BE31, BE39, BE41, BE44. See Allain (2013), *supra* n.285, p. 3 & p. 212; European Union Agency for Fundamental Rights, *Severe labour exploitation: workers moving within or into the European Union States’ obligations and victims’ rights*, June 2015.

<sup>294</sup> In BE2, the court made a distinction between abuse and exploitation, with the former not amounting to criminal conduct, leading to the acquittal of the defendant on six counts of human trafficking (the defendant was found guilty of a remaining count of trafficking). Here the court held that the situation did not amount to exploitation due to the absence of a complaint from the individuals regarding the dangerous working environment, the lack of evidence that the individuals had been working in circumstances where the well-being of the workers had not been respected, the hours worked (10-12 hours per day six days a week) and the non-payment of wages.

<sup>295</sup> Clesse et al (2014), *supra* n. 211, p. 29. Unofficial translation, original text: “*Sur la base des ces indices, les juridiction devront différencier le travail non déclaré de l’exploitation dans les conditions contraires à la dignité humaine. Autant dire que le serpent*

With this chapter and the subsequent chapter, we answer the following subsidiary research question: *How does the judiciary interpret the material scope of labour exploitation?*

In this chapter we will begin to resolve this conundrum by considering the judicial interpretation of the material scope of exploitation in the file study analysis and the judicial alignment with the analytical framework that we developed in the first two Parts of this thesis (Section 1). We will ask, to what extent do these conditions surface in the case law when interpreting the material scope of labour exploitation in law? We will see that whilst there are convergences with the conditions of exploitation that emerged from the legal and theoretical analysis in fact, the judiciary further builds on the theoretical conditions of exploitation as shown by the presentation of the legal elements of exploitation (Sections 2-7).

## **1. The relationship between the theoretical model and the material understanding of exploitation in law**

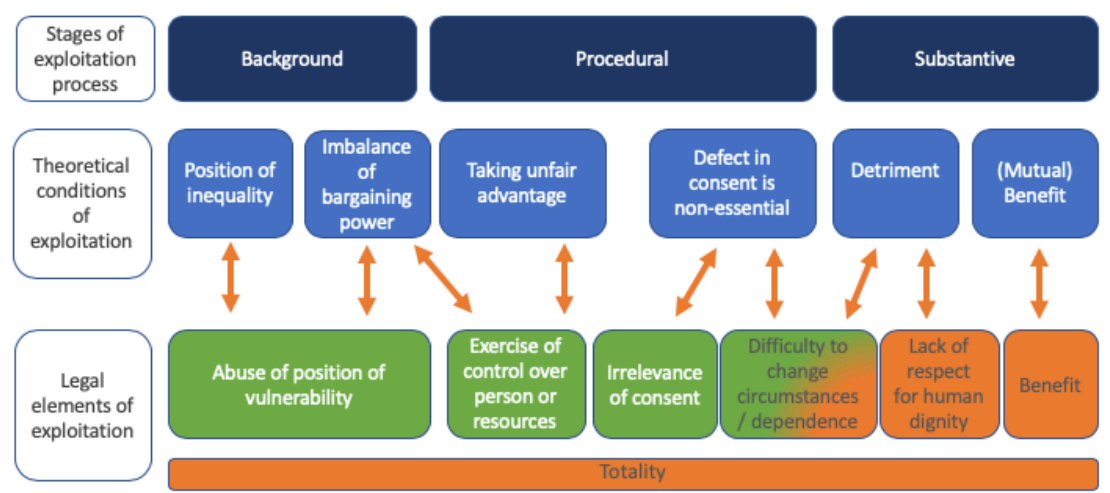
Prior to discussing in more detail the judicial understanding of the material scope of exploitation in accordance with the elements of exploitation from the legal and theoretical analysis, we will first briefly outline the relationship between the theoretical conditions and legal elements of exploitation following the analysis of the file study. The below table provides an overview of the theoretical conditions of exploitation (in blue) and the constituent elements of exploitation in law as derived from the legal analysis (in green) and the judicial interpretation of the offences in practice (in orange). The extent to which they converge or diverge will be briefly explained below and will be referred to throughout the presentation of the constituent legal elements.

The visual representation of the elements from the legal and theoretical analysis and how it aligns with the judicial interpretation of exploitation in the file study reveals both similarities and differences in the understanding of the material scope of

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*se mord la queue. Comment faire la différence entre exploitation et travail non déclaré? En recherchant une atteinte à la dignité humaine. Comment établir cette atteinte? En recherchant des infractions de droit pénal social.”*

exploitation. As discussed in both Chapter 4 and Chapter 6, the key elements of exploitation are interrelated and, their presence in isolation, will not amount to exploitation.



*Table 11: The building blocks of labour exploitation: the relationship between the theoretical conditions and the legal elements in light of the file study analysis*

As can be ascertained from the above table, most elements in law correspond to a theoretical condition. Whilst there are a significant number of convergences as with any categorisation, divergences have emerged. In particular, whilst they were not initially identified following the legal analysis in Part I, the file study reveals that **lack of respect for human dignity** is now also recognised by the judiciary as a legal element of exploitation. In addition, the analysis of the judicial interpretation of exploitation reveals two elements that have not yet been referred to, namely: **dependency** and the **totality of the situation**. Furthermore, in the theoretical model, the act of imbalance of bargaining power was primarily referred to prior to the undertaking of an exploitative exchange. However, in the file study, the imbalance of bargaining power implicitly emerges during the procedural stage but is not articulated as such. Instead, judges place an emphasis on the exercise of control over the person’s capacity or resources. In spite of the legal conditions being linear and consequential, there is one new element that is not featured in the theoretical conditions: dependence and lack of alternative. In theoretical terms, this element is very closely related to discussion around voluntariness (consent) and imbalance of bargaining power. However, the judicial analysis reveals

that it is indeed both an element that is prominent during (procedural) and after (substantive) exploitation.

As we explained in Chapter 6, the theoretical conditions are presented according to three stages of the exploitation process: background, procedural and substantive. In the legal analysis this process has emerged with the judiciary ensuring an understanding of exploitation in its totality. In particular, the judges consider that when we speak of ‘labour exploitation’ for the purposes of applying the human trafficking and standalone offences one does not have to only consider the working conditions, but all of the circumstances, including the circumstances of the individual before exploitation and the position of the individual after exploitation. The totality of the situation was not articulated as such in the typology of exploitation theories since the emphasis differed. For instance, some theories under the Redistribution Model were concerned about the background position of inequality whereas the basic needs model very much focuses upon the substantive outcome of the exploitation. Notwithstanding, the presentation of the elements of exploitation below will adhere to the process of exploitation by referring to the elements in order of consequence.

The file study reveals that the judicial understanding of the material scope of exploitation appears to be more closely aligned with the Basic Needs Model and Human Dignity Model rather than the Redistribution Model. The emphasis on *ex ante* vulnerability rather than *ex ante* inequality asserts the role of the criminal law to protect those who are vulnerable to harm rather than securing social justice and equitable distribution of resources in society more generally. The law does appear to have a role to play when such a position is abused (through the exercise of control) and impacts on the dependency of the individual to the extent that they are left with very few alternative choices. Here, in alignment with the Basic Needs Model, the law seeks to ensure that individuals have access to a basic decent minimum wellbeing. Indeed, the legal approach appears to be retrospective, to intervene when the detriment to the individual is such that it can be considered an affront to human dignity.

## 2. Abuse of a position of vulnerability (Element I)

The exploitation theories identified a position of inequality as a background condition that is instrumental to the subsequent imbalance of bargaining power (theoretical conditions I and II). As discussed in Chapter 6, the legal and theoretical analysis revealed a coherence between position of inequality in political theory and position of vulnerability in law. The analysis of the cases reveal that the understanding remains that there needs to be an inherent background feature that creates susceptibility to subsequent exploitation, however this is not expressed as a position of inequality, but rather as a position of vulnerability. The similarities between the two are that, both can be personal or structural and the existence of inequality or vulnerability *per se*, does not amount to exploitation, there needs to be something more. In exploitation theories, this was framed as ‘taking unfair advantage’ whereas in law it is framed as ‘abuse of a position of vulnerability.’

The abuse of a position of vulnerability is a well-known feature of Belgian law and is included in other legal provisions such as human smuggling, forced marriage, illegal adoption and slum housing.<sup>296</sup> In the context of the domestic offence of human trafficking, however, the abuse of a position of vulnerability is an aggravating factor and not a constituent element of the offence. Similarly, in England & Wales, the abuse of a position of vulnerability is not a constituent element of the offence (see Section 2.4 of Chapter 8). Regardless of the formal composition of the offence, the file study reveals that substantively, there is significant judicial weight given to the circumstances and the abuse of a position of vulnerability as a key aspect of determining whether or not someone was a victim of exploitation.

In England & Wales, this is particularly the case when it comes to the judicial interpretation of the standalone offences – even though none of the definitions of these offences refer to the abuse of a position of vulnerability as a constituent element. For instance, the abuse of a position of vulnerability is referred to when determining the

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<sup>296</sup> Article 77 bis, Criminal Code Human smuggling, Art. 391quater – quinquies, Criminal Code Illegal Adoption, Article 391sexies, Criminal Code Forced Marriage, Articles 443decies - 433quiesdecies, Criminal Code Slum Landlord. For more details on this legal concept see Basecqz, N.C., ‘La protection pénale des personnes vulnérables dans l’environnement numérique’, in Jacquemin, H., & Nihoul, M., (eds) *Vulnérabilités et droits dans l’environnement numérique* (Bruxelles: Larcier, 2018), pp.136-137.

level of coercion, control or deception (see Section 3) and when discussing the difficulty to change their status (see Section 4).

The vulnerable position of an individual can be based on pre-existing personal, circumstantial or situational factors, which aligns with the theoretical understanding of a position of inequality.<sup>297</sup> Section 1 of the Modern Slavery Act 2015 reflects this by explicitly stating that the determination of exploitation should consider “all the circumstances” (s.1(3)), including any of the person’s personal circumstances (such as the person being a child, the person’s family relationships, and any mental or physical illness) which may make the person more vulnerable than other persons (s.1(4)(a)).<sup>298</sup> The provision was intentionally included to ‘reflect the position in case law.’<sup>299</sup>

Different types of vulnerability are present in the file study.<sup>300</sup> In Belgium, whilst the courts affirm that vulnerability can amount to more than those listed in the legal text,<sup>301</sup> the principle form of vulnerability is the precarious or illegal administrative situation – as discussed in Section 2.3 of Chapter 8.<sup>302</sup> The impact of the irregular status of the victims led to an imbalance of bargaining power. The courts recognised this in a number of decisions where the exploited parties would not be able to negotiate working conditions comparable to a regular worker (BE1); found themselves to be without any money and far away from any support networks e.g. family (BE4 & BE11); had no knowledge of the language, their rights,<sup>303</sup> or of the cultural habits or the way of life (BE5 & BE16);<sup>304</sup> had no insurance. In one case, a socially precarious situation not based on irregular migration status (no registered address and no social security protection) was identified by the judge (BE32).

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<sup>297</sup> UNODC, *Issue paper, The International Legal Definition of Trafficking in Persons: Consolidation of research findings and reflection on issues raised*, (Vienna: United Nations, 2018), p.29.

<sup>298</sup> See for instance explanation of circumstances that make individual vulnerable in Section 1(4)(a) Modern Slavery Act 2015 (c.30) Explanatory Notes.

<sup>299</sup> Modern Slavery Bill (HC Bill 8), 2014-2015 (as introduced in the House of Commons), 10 June 2014, Explanatory notes.

<sup>300</sup> For discussion on faces of vulnerability: economic vulnerability, social and cultural vulnerability, linguistic vulnerability, legal vulnerability See Radeva Berket (2015), supra n.67, p. 365-368.

<sup>301</sup> As stated by the Court de Cassation in Cass. 9 janvier 2002, JLMB 2002/37, p. 1625 and cited in BE5, BE11.

<sup>302</sup> In all cases expect for BE7, BE15, BE28, BE32; See categorization of vulnerability as “legal vulnerability” in p. 365-368.

<sup>303</sup> For discussion on categorisation of vulnerability as legal vulnerability see p. 365-368; Anderson & Rogaly (2005), supra n.21, p. 52.

<sup>304</sup> For categorization of vulnerability as social and cultural vulnerability, linguistic vulnerability see Radeva Berket (2015), supra n.67, p. 365-368.

In England & Wales as the victims were all British nationals, EU Workers<sup>305</sup> or legally resident third country nationals,<sup>306</sup> vulnerability was not solely attributed to an administrative migration status. One exception includes the defendant fraudulently secured the entry of the complainant into the UK by changing his name and including him on passport as their adopted son (UK15). In contrast, the most prominent types of vulnerability amongst British nationals were homelessness, alcohol and drug dependency; isolation and estrangement from family and friends,<sup>307</sup> and low level of intelligence.<sup>308</sup> For the EU nationals, the most prominent form of vulnerability was poor socio-economic status where workers sought work as a result of an “economic imperative.”<sup>309</sup>

In addition, the courts considered the extent to which the exploitative situation itself “created the vulnerability” due to force of circumstances.<sup>310</sup> This was not a situation that was taken into account by the theoretical conditions of exploitation, where the inequality was very much focused on the circumstances prior to the exploitation. However, the courts identifies that there are a number of different reasons why an individual’s situation can become precarious or even more precarious as a result of the exploitation: undocumented status, homelessness, financial precarity etc. The courts go beyond assessment of the background conditions but also recognise that the creation of such vulnerability can be exacerbated by the dependence and isolation that is generated from the exercise of control/authority over the individual (see Section 3).

*Coercion sometimes results from the manipulation of a person’s vulnerability, for example, as a result of her isolation, her inability to sustain herself independently of those who hold sway over her, her fear of the police or of others. (UK8)*

<sup>305</sup> UK7, UK19, UK24, UK25, UK27, UK28, UK31.

<sup>306</sup> UK1, UK9, UK 20 Also in *Nos. 37, 38 and 65 of 2010* [2010] EWCA Crim 2880, para 4.

<sup>307</sup> UK4, UK5, UK16, UK17, UK21, UK22, UK23, UK30, UK31.

<sup>308</sup> UK4, UK8, UK12, UK14, UK16, UK23, UK30, UK31.

<sup>309</sup> UK3, UK7, UK19, UK25, UK27, UK28. For more discussion on the issue of economic imperative see Weatherburn, A., & Toft, A., ‘Managing the Risks of Being a Victim of Severe Labour Exploitation: Before and After the Modern Slavery Act 2015’, in Borracetti, M., (ed.) *Labour Migration in Europe Volume II: Exploitation and Legal Protection of Migrant Workers* (Palgrave Macmillan, 2018); Weatherburn, A., & Toft, A., ‘Managing the Risks of Being a Victim of Severe Labour Exploitation: Findings from a Research Project Exploring the Views of Experts in the UK’, (2016) *Industrial Law Journal* 45(2), 257-262. For categorisation of vulnerability as economic vulnerability see Radeva Berket (2015), *supra* n.67, p. 365-368. See also the findings of EU Agency for Fundamental Rights that identified “economic need” as a key vulnerability and a key risk factor that research participants had identified. Importantly, this was given higher importance by interviewed workers in the 2019 research than by professionals in the first stage of research, see FRA (2019), *supra* n.22, p. 65-70.

<sup>310</sup> UK1, UK3, UK4, UK5, UK12, UK14, UK21, UK22, UK23, UK31.



*As to isolation, they point to the fact that he told you that he was forbidden to contact his family and was obliged to live at the [...] site.(UK22)*

The Belgian courts also recognised that the position of vulnerability should be assessed according to the factual circumstances during and after exploitation. In BE7, the workers had legal administrative status with the correct work permits and residence documents, nevertheless, the court held that the vulnerability had been created by the control of the employer over the workers, the threats of losing job and the retention of documents. Similarly, in BE34, despite an illegal administrative situation, the health problems caused by the injuries following a work accident were deemed by the court to create the vulnerable position of the individual.

As mentioned above, the position of vulnerability on its own is not sufficient, aligning with the theoretical understanding that position of inequality alone is not sufficient. Indeed, in law as with theory, it must be established by credible evidence that in addition to the existence of a vulnerability that it was known to the offender and was abused.<sup>311</sup> The knowledge of the position of vulnerability is necessary in establishing the *mens rea* element of the offence, to show that the defendant intended to exploit the individual.<sup>312</sup> As a result, the defendant is seen to be making use of the vulnerability for their own benefit e.g, financial benefit<sup>313</sup> or commercial advantage,<sup>314</sup> whilst displaying a lack of respect for the individual themselves. Such examples include, knowingly keeping the irregular workers off the books so that they were not identified by auditors (UK19). In Belgium, the abuse of vulnerability was often orchestrated by the deliberate choice of employing undocumented workers. In one case (BE6), the recruitment of illegal workers on low wages in order to gain the maximum profit from a cleaning sub-contract, wherein the terms and conditions were poor, e.g. one month free, competition in the sector. In another case (BE22), the workers worked at night to avoid inspection. Exploiters also deceived individual by offering to either

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<sup>311</sup> UNODC Issue Paper (2018), supra n.297, p. 29.

<sup>312</sup> UK3, UK4, UK5, UK6, UK7, UK8, UK9, UK12, UK14, UK16, UK17, UK19, UK21, UK22, UK23, UK24, UK25, UK27, UK28, UK30, UK31.

<sup>313</sup> UK3, UK4, UK5, UK6, UK8, UK9, UK14, UK19, UK23, UK24, UK25, UK27, UK28, UK30, UK31.

<sup>314</sup> UK7, BE4.

provide assistance with regularising their administrative status or by promising regular wages upon regularisation:<sup>315</sup>

*That because of this situation of illegal residence, which is in this case the illegal administrative situation covered by the law, and its corollary, being in a state of need, it is understood that [victim 1] and [victim 2] had no other choice but to remain under the influence of the accused.*<sup>316</sup>

Other promise of benefits include marriage and return to country of origin (BE26). Another example includes, informing the victims that they could leave at any time whilst knowing that this was not a real possibility due to their illegal administrative situation and the need to feed their children: ‘the defendant knew that because of their irregular situation and the fact that they needed to feed their family, [victim 1] and [victim 2] did not have any real possibility of leaving him.’<sup>317</sup> In some cases, the exploiter sought to exonerate their role by stating that they were offering the individual with something better than the alternative. For instance, in nine cases, the alternative to exploitation would have been homelessness or destitution,<sup>318</sup> which was a defence argument that was dismissed by the judiciary (see Section 2.4, Chapter 8).

The Belgian judiciary applies a three-stage test to determine the existence of the abuse of a position of vulnerability: the first two elements have already been discussed above, i) existence of a position of vulnerability (situation of weakness or precarity); and ii) knowledge and abuse of position of vulnerability. A third stage is added that requires that the knowing abuse of the position of vulnerability leads to an iii) inability to change status and no other alternative but to submit to the abuse. This latter requirement is similar to the understanding of servitude in England & Wales where it is necessary to demonstrate the “impossibility to change status” (see Section 2.3, Chapter 8). The manner in which the vulnerability of the individual is abused is through

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<sup>315</sup> BE6 – The victim was black mailed upon recruitment with a promise that his migration status would be regularised and that he would receive normal pay. See also instances of false promises and financial control of workers in irregular migration status in FRA (2019), supra n.22, p. 62.

<sup>316</sup> BE6 - Unofficial translation, original text: “*Qu'en raison de cette situation de séjour illégal, laquelle constitue en l'espèce la situation administrative illégale visée par la loi, et de son corollaire, étant un état de besoin, il se comprend que [victim 1] et [victim 2]. n'ont eu d'autre choix que de demeurer sous l'emprise du prévenu.*”

<sup>317</sup> BE18 - Unofficial translation, original text: “*le prévenu savait qu'en raison de sa situation irrégulière et du fait qu'il devait nourrir sa famille, [victime 1] et [victime 2] n'avaient pas la possibilité réelle de le quitter.*”

<sup>318</sup> UK1, UK4, UK5, UK6, UK9, UK12, UK14, UK22, UK30.

manipulation<sup>319</sup> either leading to no alternative but to submit to the working conditions<sup>320</sup> or an increased dependence on the exploiter for food, accommodation, money due to the lack of right to reside or work. Such abuse of socially precarious situations inevitably bolsters the dependence on or the exercise of control by the exploiter,<sup>321</sup> an issue recognised by the courts. For instance, in one case (UK4), the courts stated that the low intellectual ability of the individual meant that they were easily manipulated. We will further consider dependence and difficulty in changing circumstances (Section 4), but for now we will consider the second element of exploitation which we believe is a key means of maintaining and indeed further exacerbating an individual's position of vulnerability: the exercise of control over person's capacity or resources. This condition is intrinsically linked to creating a situation of dependence that leaves the individual no other choice but to continue to submit to the ongoing abuse.

### 3. Exercise of control over person's capacity or resources (Element II)

*The common denominator is that the victim is subject to a degree of enforced control.*<sup>322</sup>

The above citation from the Court of Appeal judgment in *R v SK* [2010] refers to the “common denominator” between the standalone offences as control, thus reinforcing the position that these forms of exploitation are not mutually exclusive. The file study confirms this position wherein the exercise control over the individual's capacity or resources is a key issue.<sup>323</sup> Again, as discussed in Chapter 6, we see an alignment between the legal elements and theoretical conditions as we consider that the ability to exercise of control over a persons' capacity or resources is made possible by an imbalance of bargaining power, however, the judicial understanding goes further by placing an emphasis on the means that are used to exert the exercise of control.

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<sup>319</sup> UK4, UK8, UK21.

<sup>320</sup> BE6, BE8, BE13, BE36, BE41.

<sup>321</sup> BE7, BE8, BE16.

<sup>322</sup> *R v SK* EWCA Crim 1978, para. 40 (UK1).

<sup>323</sup> BE29: role of defendant in trans-European network; “It is apparent that when police investigations began the offenders used their control over some of their workers and former workers by attempting to persuade them to give untruthful accounts of working conditions” in *R v Attorney General's Reference Nos. 37, 38 and 65 of 2010 (Shahnawaz Ali Khan, Raza Ali Khan and Perveen Khan)* [2010] EWCA Crim 2880, para 19; UK8 the judge directed the jury stating that the jury is entitled to conclude that whoever controlled [the victim's] ID, controlled [the victim's] freedom of movement in the UK; A relationship of subordination or control was present in the following case UK1, UK3, UK4, UK5, UK7, UK 9, UK12, UK14, UK15 ,UK19, UK20, UK21, UK22, UK23, UK24, UK25, UK27, UK28,UK30, UK31.

In Belgium, the inclusion of “taking or transferring control” as an action in the domestic offence of trafficking is deemed to be consistent with the regional definition of the action elements in the human trafficking offence. The Belgian courts have domestically interpreted this action as being synonymous to the exercise of authority [*lien de subordination*] an aggravating factor in the Belgian offence.<sup>324</sup> Furthermore, considering the prevalence of cases where persons are working in an irregular situation, the existence of a contract of employment is not necessary to determine the exercise of authority in the context of an employment relationship.<sup>325</sup>

In Belgium, the exercise of the control is a constituent element, and as such is sufficient to satisfy the action element of the human trafficking offence. It does not require evidence of any recruitment, transportation, reception or harbouring. This aspect of the definition has been interpreted as being equivalent to the sale [*la vente*] of a person (see Section 2.1, Chapter 8). Such an interpretation may well be necessary in the Belgium context in light of the lack of a standalone offence of slavery as it invokes the exercise of powers attaching to the rights of ownership. In England & Wales, the ability to fully discern the judicial understanding of the meaning of slavery is limited due to the very low number of cases dealing with slavery on the indictment.<sup>326</sup> Where slavery is discussed, mostly in order to distinguish between servitude and slavery, it is however possible to identify that the exercise of control in the context of slavery is closely linked to the property paradigm. For instance, the reduction of an individual to that of an object is often referred to with the individual being ‘treated as an object or animal’ (UK23) or as ‘property, chattel, treated as a commodity’ (UK9). However, in one case (UK8), despite the factual circumstances indicating that the individual was ‘treated as a commodity’, the victim was ‘sold for 5,000 GBP for the purposes of marriage,’ neither the indictment nor the court dealt with this as a case of slavery.

More broadly, the exercise of control is exerted via the threats or use of physical violence and an aggressive personality (BE8). Similarly, in one British case, the court ruled that coercion is interpreted as the ability to persuade someone to do something by the use of force or threats (UK7). The Court of Appeal recognised that the exercise of

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<sup>324</sup> Rapport fait au nom de la Commission Justice de la Chambre, de MME Daphné DUMERY, 4 mars 2013, (Doc.parl., Chambre, Doc 53- 2607/004), p. 8.

<sup>325</sup> BE18; Myria (2016), supra n.71, p. 153-154; Clesse (2013), supra n. 111, p.204.

<sup>326</sup> UK1 – holding another person in slavery, UK8 – human trafficking for slavery.

control, through use or threats of force was ‘to secure compliance with the demands of the Defendant’s family, and to instil fear of retribution into them if any one of them should try to leave the site of operations.’<sup>327</sup> The below table outlines the multiple means used by the employers in the cases analysed to exercise control over the person and/or their resources, as outlined in the analytical framework that are derived from the international or regional legal instruments, such as the means in human trafficking offence or ILO forced labour indicators, as discussed in Part I :

	Belgium	England & Wales
Use of coercion/deception	4	15
Use of force: Physical and sexual violence to person	8	12
Use of force: Physical and sexual violence to others	0	0
Threats of force: Threats of physical violence to person	6	3
Threats of force: Threats of physical violence to others	0	4
Intimidation and threats	1	18
Abduction	0	3
Fraud e.g. false benefit claims, control of bank accounts, no social security contributions	5	7
Promise of benefit e.g. regularisation – to achieve act and/or maintain exploitation	9	
Isolation	4	17
Restriction of movement	10	14
No restriction of movement	2	0
Debt bondage	5	8
Retention of ID documents	7	9
Menace of penalty	6	10
Relationship of subordination	9	0

**Table 12: Means used to exercise control over person or resources**

The means identified in the above table that are used to exercise control over the person or their resources are very closely aligned to the means that are identified in the supranational understanding of the offences. For example, in the context of forced or compulsory labour, the menace of penalty is understood to amount to compulsion, coercion and constraint and can be imposed directly or indirectly. The constraint can

<sup>327</sup> *R v Connors [Luton]* [2013] EWCA Crim 368, para 7 (UK4).

be physical, mental or caused by force of circumstances. The courts interpreted the latter form of constraint to include the creation of vulnerability during the exploitation period.<sup>328</sup> As a result, the categorisation of the labour is irrelevant, the work can equally be carried out in legitimate labour market or in an illicit manner e.g. forced criminality (UK23). Similarly, the work can be conducted in a domestic setting, as part of a family context.

Coercion to provide work or services is a constituent element of the offence of servitude. However, the courts have a mixed position regarding the existence of coercion, leading to a varied application in the context of the offence of servitude: in one case, the court held that the provision of work or services **did not require** coercion, the judge stated that:

*In my judgement, acts done to any party to the conspiracy, in furtherance of the conspiracy, in themselves do not have to involve an element of coercion to provide services, but be sufficient in overall context of the case for a jury to be sure that net effect would keep [name of victim] in that position.*(UK20)

In one case (UK22) the court stated that work or services are **often** provided through the use of coercion alternatively in another case (UK23), the court stated that the work or services **must always** be provided through the use of coercion. Similarly, in UK15 the vulnerability of the victim, was sufficient to demonstrate the existence of coercion, however in UK22, the court held that coercion must involve the presence of vulnerability **and** the use of threats or violence, which would amount to an abuse of position of vulnerability.

The result of the use of these means to exercise control over the person or their resources reinforces the pre-existing imbalance of bargaining power. Unlike in the theoretical typology of exploitation where the imbalance of bargaining power is a background condition alone, the judges further discern the imbalance of bargaining power by the outcome of the exercise of control on the exploited party as opposed to the exploiter. We will discuss the impact on the exploited party below in Sections 4 and

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<sup>328</sup> UK5, UK22, UK23.

5, however we will briefly consider the benefit of the exploiter. In the theoretical understanding of exploitation, there is no need for a benefit to materialise, however, the file study reveals that the result of the exercise of control, for the exploiter, is very often a disproportionate [financial] benefit, as noted by the court in UK30: ‘depriving them of the ability to make their own choices, provided you the ability to accumulate substantial wealth, your enrichment was on the back of their exploitation.’ For instance, the provision of both work and accommodation is seen as a way of reducing the overall costs, as illustrated by the court in BE3: ‘since he deducted the price that the work he had done, either for free or at a ridiculously low price, would have cost him... this provision of accommodation was intended to enable the defendant to make an abnormal profit.’<sup>329</sup> The exercise of control is thus calculated as part of the business model, in order to maximise profit [*le but de lucre poursuivi*].<sup>330</sup> For the Belgian judiciary, the pursuit of a financial benefit or pecuniary advantages is a sentencing factor, which is often referred to when determining the penalty:<sup>331</sup> and is measured by comparing the affluent living standards of the exploiter in comparison to the workers who were maintained in precarious conditions.<sup>332</sup>

#### 4. Dependence and difficulty to change circumstances (Element III)

The third element is indicative of the outcome of the abuse of position of vulnerability and the exercise of control on the individual exploited party: a position of dependence and a difficulty to change circumstances.<sup>333</sup> The latter was first discussed in relation to the legal analysis (Section 1, Chapter 4) however, the file study reveals that the judiciary place significant emphasis on dependence as an element of exploitation by recognising that such dependence can result from a situation that deteriorated over time, emphasising the fluidity of exploitation along a continuum.<sup>334</sup> Furthermore, the deterioration is very often the result of increased control of the exploiter and their use

<sup>329</sup> BE3 – Unofficial translation, original text text: “*puisque’il en retirait le prix que lui auraient coûté les travaux qu’il a fait effectuer, soit gratuitement, soit à un prix ridiculement modique....cette mise à disposition des logements avait pour but de permettre au prévenu de réaliser un profit anormal*”

<sup>330</sup> BE1, BE6, BE9, BE10, BE21.

<sup>331</sup> BE1, BE5, BE7, BE11, BE12, BE13.

<sup>332</sup> BE20, BE22, BE26, BE32, BE34, BE43.

<sup>333</sup> The FRA recognised a number of risk factors which can lead to increased vulnerability to exploitation, including dependence. See also, Weatherburn & Toft, (2016), supra n. 309; Weatherburn & Toft, (2018), supra n. 309.

<sup>334</sup> Brennan, D., ‘Subjectivity of Coercion: Workers’ Experiences with Trafficking in the United States’, in Kotiswaran, P., (ed.) *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, (Cambridge: Cambridge University Press, 2017), p.139.

of coercion or deception – as discussed in the previous section - that facilitates dependence and ultimately the difficulty for the exploited individuals to change their circumstances (see below).

In both jurisdictions, the file study illustrated a number of situations where the continuum of exploitation is applicable, including: where there is clear evidence of the deterioration of the relationship between the complainant and the exploiter;<sup>335</sup> a shift from good working conditions to non-payment of wages (BE21); the complainant is groomed and/or conditioned to accept a particular situation<sup>336</sup> and where some victims are better treated than others. For the latter, the treatment of the victim may be better for a number of reasons, including the exploiters belief that they are of more ‘value’ than others (UK4, UK31), or according to the migration status of the workers. For instance, in Belgium, in some cases, the treatment of the EU nationals was not considered to be severe enough to amount to human trafficking, and as a result they were removed from the indictment, whereas the illegally employed third-country nationals are not treated in the same way, which is closely interrelated to the assessment of the background conditions of the individuals to the actual situation of exploitation. In one case (BE47), for instance, the defendants were acquitted of human trafficking of the European workers.

Dependence is not a constituent element of the offence in either jurisdiction. However, it has been shown that it is key to the determination of exploitation and has been explicitly mentioned by the courts, in combination with other elements, when interpreting exploitation.<sup>337</sup> The dependence can be created in a number of ways but predominantly results from the exercise of control over the person or their resources. The types of dependence that have emerged include financial<sup>338</sup> (also, financial precarity imposed through force of circumstances) linguistic,<sup>339</sup> subsistence (provision of food, accommodation and medical assistance),<sup>340</sup> lack of rights awareness (BE5,

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<sup>335</sup> UK1, UK3, UK4, UK15, UK20, UK23, UK24, UK30.

<sup>336</sup> UK6, UK15, UK21, UK30.

<sup>337</sup> BE5, BE7, BE13, BE15, BE16, BE26, BE29, BE38, BE42, BE43, UK4, UK8.

<sup>338</sup> BE1 – withholding wages due to poor workmanship, BE5 – debt bondage, BE6 – promise of normal wages upon regularisation, BE13 – debt bondage, BE15, BE29 – deliberate withholding of wages to make them dependent, BE32, UK3, UK4, UK5, UK6, UK7, UK8, UK17, UK19, UK23, UK24, UK25, UK27, UK28, UK30, UK31, BE42 .

<sup>339</sup> BE5, BE15, UK3, UK7, UK8, UK19, UK24, UK25, UK27, UK28.

<sup>340</sup> NB subsistence needs not always met. UK1, UK3, UK4, UK5, UK6, UK7, UK9, UK12, UK15, UK16, UK20, UK21, UK22, UK23, UK24, UK25, UK27, UK28, UK30, UK31 BE3 - Acceptance of accommodation; BE8 – fear of losing accommodation; BE13 – properties owned by exploiter who also demanded rent; BE28 – accommodation; BE40 – medical assistance.



BE26) and legal status (BE36), indoctrination and dependence imposed by systematic approach to recruitment (UK4). Of course, in reality, such dependence emerges as a combination of factors: “situation of social, moral and financial precarity.” (BE5).

The lack of financial resources – as a result of non-payment or withholding of wages - when coupled with the provision of other forms of subsistence such as accommodation, food, transport etc., can weaken the independence of the individual by tying them to the exploiter, leaving them with very limited alternative opportunities. Coercion and deception are also integral to the exercise of control that can be achieved via the creation of dependence. In particular, the British judges articulate this as the creation of dependence during the period of exploitation as a result of “force of circumstances.”<sup>341</sup>

The impact of the exploitation on the individual can be characterised by a difficulty to change circumstances.<sup>342</sup> This assessment is prominent in the ECtHR case law in the context of the interpretation of involuntariness in context of forced or compulsory labour and servitude:

*The fundamental distinguishing feature between servitude and forced or compulsory labour within the meaning of Article 4 of the Convention lies in the victim’s feeling that their condition is permanent, and that the situation is unlikely to change. It is sufficient that this feeling be based on the above-mentioned objective criteria or brought about or kept alive by those responsible for the situation.*<sup>343</sup>

The concept is also prominent in the EU Directive’s explanation of abuse of position of vulnerability in Article 2(2) EU Directive 2011, as ‘a position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved’. The Belgian law (Article 433 septies) explicitly asserts such a connection, wherein the aggravating factor of an abuse of position of vulnerability is premised upon a three-stage test as discussed above in Section 2. The third stage of this test states that ‘*the person does not have another*

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<sup>341</sup> UK1, UK3, UK4, UK5, UK12, UK21, UK21, UK22, UK23, UK31.

<sup>342</sup> BE1, BE3, BE5, BE6, BE7, BE10, BE11, BE16, BE18, BE21, BE24, BE26, BE30, BE31, BE32, BE39, BE41; UK1, UK3, UK4, UK5, UK6, UK7, UK8, UK9, UK12, UK14, UK15, UK20, UK21, UK22, UK23, UK24, UK25, UK27, UK30, UK31.

<sup>343</sup> *C.N. and V. v. France*, 11 October 2012, Application No. 67724/09, para 91.

*genuine and acceptable choice to not submit to the abuse.'* The Belgian courts have applied the test when determining whether the abuse of a vulnerability can be characterised as a situation whereby the individual has no other real alternative or lack of choice but to submit to the abuse:

*That it is indisputable that he has abused it [the precarious situation], [civil party 1] declaring that on several occasions his boss had told him that if he was not happy, he could leave; although the accused knew that because of their irregular situation and the fact that they had to feed their family, [civil party 1]. and [civil party 2]. did not have the real possibility of leaving him.<sup>344</sup>*

*He was not happy, but he had no other choice because he was undocumented. That's why he was exploited.<sup>345</sup>*

For many exploited parties, by virtue of their administrative or socially precarious situation, the only alternative option to the exploitation was homelessness or destitution leading to the acceptance of abusive living conditions (BE3, BE41). Arguably, whilst the inclusion of such a standard is comparable to Article 2(2) EU Directive 2011, the Belgium application of this inability to change circumstances as part of an aggravating circumstance -and not a constituent element - sets a lower standard.

The courts in England & Wales also make reference to the lack of alternatives the exploited party faces. The principle point of reference for the purposes of judicial interpretation was the understanding of the phrase “impossibility to change status.” In the Court of Appeal decision in *AG Ref Nos. 37, 38 and 65 of 2010* [2010] EWCA Crim 2880, the complainant’s decision to return to the UK was put into question. In response the complainants stated that they ‘were promised that their working conditions would be improved and the offenders’ behaviour towards them would change. They were led to believe that they were valued employees.’<sup>346</sup> In the file study, the assessment of the

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<sup>344</sup> BE18 - Unofficial translation, original text: “Qu’il est incontestable qu’il [la situation precare] en a abusé, O.P. déclarant qu’à plusieurs reprises, son patron lui avait dit que s’il n’était pas content, il pouvait partir; Qu’or, le prévenu savait qu’en raison de sa situation irrégulière et du fait qu’il devait nourrir sa famille, O.P. et O.M. n’avaient pas la possibilité réelle de le quitter.”

<sup>345</sup> BE21 - Unofficial translation, original text: “Il n’était pas content mais il n’avait pas d’autres choix car il est sans papier. C’est pour ça qu’il était exploité.”

<sup>346</sup> *R v Attorney General’s Reference Nos. 37, 38 and 65 of 2010 (Shahnawaz Ali Khan, Raza Ali Khan and Perveen Khan)* [2010] EWCA Crim 2880, para 18. For further discussion of this case see Bowen (2017), supra n.122, p.219.

possibility of leaving the exploitative situation and thus changing their status was considered in a number of cases.

In one subsequent case (UK9), the court ruled that the lack of choice emanated from ‘the violence, threat of violence and undercurrent of violence [that] pervaded the household.’ Similarly, in cases where there is an element of financial control, it is also considered as a means of control wherein the removal of funds, limits the means and opportunity for leaving (UK23). The same assessment was used for the discussion of loss, denial or restriction of geographical freedom, where despite it being used as an indicator of non-exploitation by the defence (UK1), the courts held that this was not a necessary element of exploitation (UK4 & UK15): ‘It was not necessary to prove that the complainants were physically detained or imprisoned because they were controlled by threats, exploitation and indeed infantilisation so that each of them was *deprived of the resources and will to get away*’ [emphasis added].<sup>347</sup> In such instances, the court emphasised the restriction of their ability to change their circumstances, rather than the extent to which they were physically restricted in their movement.

In such cases, a subjective test focusing on the state of mind of the individual was adopted to determine the extent to which the individual “finds” it impossible to change the status. In most cases the notion of “impossibility” was discussed in situations where the individuals had decided to leave but were persuaded/forced to return. For instance, in UK4, the complainants left but were persuaded to return because of false promises of pay and a preference of life with the defendant instead of “life of beggary on the streets.” Similarly, in UK31 both complainants were accommodated because they had nowhere else to go, but equally they could not change their status because otherwise they would have ended up destitute. Indeed, one complainant left the defendant’s house but came back because “he was incapable of surviving on streets.” In another case (UK22), the complainants were required to live on site and found it impossible to change their position in the family business. When they did manage to leave, the defendants searched for them and returned them to the site. Similarly, in UK5, the extent to which victims found it impossible to change their status was considered by the court. The judges, when ruling on a submission of no case to answer, took into

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<sup>347</sup> *R v Connors [Luton]* [2013] EWCA Crim 368, para 7 (UK4).

account the evidence of others who had left and either returned willingly or who did not return at all, deciding that the different approaches of the various complainants, ‘makes it impossible, in my judgment, for the jury to be sure of that element of the offence.’<sup>348</sup> Thus, this element is also indicative of the distinction between servitude and forced or compulsory labour, as emphasised in the judge’s sentencing remarks: ‘their return is no endorsement of that way of life as acceptable, but the exercise of that degree of choice serves to emphasise that this is a case of forced or compulsory labour rather than servitude.’<sup>349</sup> However, the different outcomes for different individuals highlights the need for the circumstances to be assessed on a case by case basis as it will impact on the determination of dependence, the exercise of control, the abuse of vulnerability. Furthermore, such an assessment must take into account the extent to which the outcome is detrimental to the exploited party, as will be discussed in the next section.

## **5. Lack of respect for human dignity (Element IV)**

The theoretical conditions of exploitation identified the need for a detriment to the exploited party, the assessment of which varied amongst theorists (harm, degradation, humiliation, lack of respect etc.). One point of convergence however, was that detrimental exploitation can also be mutually advantageous.

The file study reveals that courts in both countries refer to a lack of respect for the human dignity of the individual when assessing the impact of the situation on the exploited party.<sup>350</sup> However, the weight of these considerations differs, for instance, in Belgium, both a constituent element of the human trafficking offence and an aspect relevant for sentencing when making reference to the attack on the physical integrity of the individual and/or the lack of respect for the individual’s human dignity.<sup>351</sup> Whereas in England & Wales, references to the lack of respect of the individual is prevalent in sentencing only and when considering the behaviour/intention of the defendant in order to determine the appropriate penalty to reflect the severity of the situation. For example,

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<sup>348</sup> UK5, Ruling on submission of no case to answer 23.11.12, para 29.

<sup>349</sup> UK5, Sentencing remarks -19.12.12, para 50.

<sup>350</sup> UK4, UK5, UK6, UK7, UK8, UK9, UK12, UK17, UK20, UK21, UK 22, UK25, UK28, UK30, UK31.

<sup>351</sup> BE1, BE3, BE5, BE6, BE8, BE9, BE10, BE11, BE12, BE13, BE15, BE18, BE20, BE22, BE26, BE27, BE32, BE34, BE39, BE40, BE43.

in England & Wales, when discussing the standalone offences of slavery and servitude, the lack of respect of human dignity is at the fore of the discussion regarding the treatment of an individual as an object, a possession or property;<sup>352</sup> as illustrated by the following examples:

- *You [D1 and D2] did not treat [V1] as a fellow human being. To you she was merely an object to be used, abused and cast aside at will. She was an ideal target for exploitation. You took full advantage of her extreme vulnerability.*<sup>353</sup>
- *Exploitation of fellow human beings in any of the ways criminalised by legislation represents deliberate degrading of a fellow human being or human beings.*<sup>354</sup>
- *These offences involved deliberate degrading of human beings.*<sup>355</sup>
- *[The] judge [was] entitled to conclude that you degraded the lives of victims each of whom you knew to be vulnerable and did so through fear.*<sup>356</sup>

The above examples illustrate the emphasis placed on exploitation as degradation in the sentencing remarks and *obiter dicta* of the judgment and the legal arguments of counsel.<sup>357</sup> The following forms of degradation were referenced by the judges: in UK6 the defendants shaved the heads of the victims, in UK15 the defendants were accused of child cruelty, and in UK16 the defendants enforced drug use. Such degrading treatment represented a lack of respect for human dignity.

Besides the explicit reference to human dignity as a constituent element of the human trafficking for economic exploitation offence in Belgium, we note that, in fact, the outcome of the situation of exploitation may not be of relevance to the determination of the material scope of labour exploitation in the context of human trafficking. The way in which the offences are formulated in both countries makes this apparent. For instance, the *mens rea* of human trafficking is ‘for the purpose of’ exploitation. Thus legally, a detriment is not a key requirement. This is also in line with the regional and

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<sup>352</sup> UK1, UK5, UK8, UK9, UK20, UK22.

<sup>353</sup> UK9 - Sentencing remarks.

<sup>354</sup> UK12 - CPS – 17.1.14 – response to defence application to dismiss, Para 10.

<sup>355</sup> *Attorney-General's Reference Nos 2, 3, 4 and 5 of 2013 (R v Connors & Ors)* [2013] EWCA Crim 324 cited in *R v Timothy Joyce* [2017] EWCA Crim 337, para 24 (UK17).

<sup>356</sup> UK28 -Appeal judgment.

<sup>357</sup> UK9, UK12, UK16, UK28, UK30. The recent FRA research findings emphasised degrading treatment as one of the many forms of violence and threats that are used by exploiters as a strategy for maintaining the individual in a position of exploitation see FRA (2019), *supra* n.22, p.60.

international definition of human trafficking. However, in practice and as the file study demonstrates, the impact of such egregious exploitation in all cases amounts to an affront to the human dignity. It is for this reason that the next element to be discussed is deliberately paradoxical. The theoretical analysis reveals that a defect in consent is non-essential, whilst this remains to be the case in the legal analysis it is nevertheless a *fil rouge* that requires attention and consideration as will be further explained in the next section.

## 6. The principle of irrelevance of consent (Element V)

Both the legal and theoretical analysis of exploitation revealed that a defect in consent is non-essential, meaning that consent is irrelevant to the determination of the material scope of exploitation (Section 1, Chapter 4 & Section 4, Chapter 6). However, the application of the principle of irrelevance of consent in the file study can be described as a “double-edged sword.” Despite its irrelevance, it is nevertheless ever present in determining whether or not exploitation has occurred or not, indeed our findings from the file study align with Gallagher’s assertion, discussed in an earlier chapter, that ‘consent is a sub-text at every stage of the criminal justice response to human trafficking’<sup>358</sup> (see Section 2, Chapter 4). In this regard, it is important to reiterate that its inclusion in statute has not been straightforward, as we saw in Chapter 8.

Despite the legislative discussion regarding consent, the file study reinforces its irrelevance.<sup>359</sup> This principle is applied to those who have solicited the work in the first instance,<sup>360</sup> consented at the point of recruitment,<sup>361</sup> facilitated the exploitation of others by having an active role in the recruitment of another<sup>362</sup> and “appear” to consent to the working conditions even if they are exploitative.<sup>363</sup> The following citations demonstrates that any assessment of the constituent elements should not take into

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<sup>358</sup> Gallagher, A., ‘The International Legal Definition of “Trafficking in Persons”’: Scope and Application’ in Kotiswaran, P., (ed.) *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, (Cambridge: Cambridge University Press, 2017), p. 96.

<sup>359</sup> BE5, BE11, BE13, BE18, BE31, BE35, UK21, UK25 Consent to travel i.e. human trafficking action, UK28.

<sup>360</sup> BE18, BE21, BE24, BE27, BE36, UK28.

<sup>361</sup> BE5, BE10, BE11, BE13, BE18, BE21, BE44, UK1, UK3, UK4, UK5, UK8, UK9, UK12, UK14, UK15, UK21, UK22, UK23, UK24, UK25, UK27, UK30, UK31.

<sup>362</sup> BE27, BE31.

<sup>363</sup> UK19, UK24, UK31 -returned to situation because of homelessness.

account the perception of the individual and their own subjective assessment of the situation:

*The notion of human dignity should not be assessed on the basis of the perception of the facts which was possibly that of [individual] at the beginning of the employment relationship.*<sup>364</sup>

In Belgium, in an earlier case (BE2 in 2010) one of the justifications for the removal of the human trafficking offence from the indictment pertaining to six potential victims of human trafficking was that they had not complained of the treatment – this did not occur in future cases where the individuals refused to request victim status (BE10 in 2012). Similarly, the fact that the individual did not leave the situation does not mean that the individual was willingly doing the job (UK21), in this instance there is a suggestion that the threshold is higher in the UK as it requires evidence of the lack of voluntariness, rather than threshold in Belgium where for economic exploitation, the consent of the victim is irrelevant. In such instances, where there is an apparent consent to accept and undertake the work offered, the prosecution will have to convince the judge and jury that the testimony of the victims and witnesses supports all the elements of the offence of trafficking or slavery by corroborating their testimony with other evidence to prove their dependency.<sup>365</sup>

It is common for potential victims to consider themselves not to be victims at all. For example, male victims may not believe their victimhood due to reasons of masculinity.<sup>366</sup> The file study reaffirms that the understanding of ‘what constitutes exploitation is to be measured objectively against the standards in the country in which the exploitation takes place [...] and not on the basis of the victim’s prior situation, his or her views about the exploitative situation, or his or her cultural, national or social background.’<sup>367</sup> In both jurisdictions, the judiciary emphasised that the **exploitation is be assessed according to the objective standards** of England & Wales (UK1 & UK3)

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<sup>364</sup> BE21 - Unofficial translation, original text: “la notion de dignité humaine ne doit pas s’apprécier sur base de la perception des faits qui était éventuellement celle de [individu] au début de la relation de travail.”

<sup>365</sup> Bowen (2017), supra n.122, p.219.

<sup>366</sup> Surtees, R., ‘Trafficked Men as Unwilling Victims’ (2008) *St Antony's International Review*, 4(1), 16-36.

<sup>367</sup> UNODC Issue Paper (2018), supra n.297, p.32.

and Belgium,<sup>368</sup> respectively, and not the individual's perception of what is acceptable or of the standards of their country of origin:

*[The] standards that you apply, indeed the standards that you as a jury by your decision help to set, are the standards expected of employers towards their employees in this country wherever they may come from.*<sup>369</sup>

In the Belgian file study where the majority of victims are working in an irregular migration situation, the salary and working conditions in Belgium are nevertheless an improvement in comparison to their country of origin. However, the Belgian law has made it clear that the situation of victims must be examined in function of Belgian working conditions and not in accordance with the conditions which are applied in their country of origin.<sup>370</sup> This has been further reinforced by the judiciary (BE21, BE43).<sup>371</sup> Furthermore, the victim's apparent compliance with a situation does not demonstrate consent but rather, could also be an indicator of the precarity of their situation more so than their satisfaction<sup>372</sup> and as a result the willingness to continue to work in exploitative conditions. Examples from the file study include, the hope of receiving wages at a future moment (BE29); fear of losing job (BE43 & BE45) and a lack of alternative (BE31). In particular, the lack of a complaint from a victim (BE2 & BE35) may not only be an indicator of the economic, psychological or physical pressure being put on the worker but is also not necessary for a criminal investigation to be initiated.<sup>373</sup>

In England & Wales, such instances have subsequently been characterised by the exercise of control and manipulation of the exploiters, which has meant that due to such an imbalance of power, the individuals were conditioned to the extent that their free will is overborne.<sup>374</sup> For instance, the manipulation and the subsequent imbalance

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<sup>368</sup> BE21, BE24 – appeal, BE43

<sup>369</sup> *R v SK* [2011] EWCA Crim 1691, para 26.

<sup>370</sup> Article M3, 3.1, Service Public Fédéral Justice, *Circulaire du 23 décembre 2016 relative à la mise en œuvre d'une coopération multidisciplinaire concernant les victimes de la traite des êtres humains et/ou certaines formes aggravées de trafic des êtres humains* (23 décembre 2016).

<sup>371</sup> The following was cited in BE21 G. Ladrière, « De l'abolition de l'esclavage en passant par le droit pénal social à la traite des êtres humains, mercuriale reprise dans la doctrine juridictionnelle du droit pénal social, Larcier, p. 896 ». See also discussion of BE21 in Centre fédéral pour l'analyse des flux migratoires, la protection des droits fondamentaux des étrangers et la lutte contre la traite des êtres humains, *traite des être humain* (2013) supra n.72, p. 111. The following Court of Appeal judgment was cited in BE34 Cour d'appel de bruxelles, 16 novembre 2001, no du greffe: 1480.

<sup>372</sup> Corr. Nivelles, 4 june 2000.

<sup>373</sup> Clesse (2013), supra n. 111, p.227.

<sup>374</sup> UK3, UK4, UK5, UK6, UK8, UK9, UK14, UK16, UK17, UK19, UK21, UK23, UK25, UK27, UK28, UK30, UK31.



of power of the exploiter meant that the ‘imbalance [was used] as a tool in his coercion of V and his overbearing of V’s will’(UK4) and the exploited party was deprived of ‘the ability to exercise free will, to make their own choice’(UK30). In such cases, the absence of a complaint does not mean that there was no exploitation, as this could be an indicator of the conditioned status of the individual, as a result of their will being overborne.<sup>375</sup> The emphasis here on overbearing an individual’s ability to exercise their free will reinforces the need to consider consent and involuntariness in all circumstances. In this regard, initial consent is irrelevant to the determination of menace of penalty and involuntariness, as it is necessary for the court to have regard for all circumstances of the forced labour (UK12). One indicator of involuntariness or coercion is the level of pay, which holds significant evidentiary importance (UK23), as it ‘bear[s] upon the employee’s ability to escape the employer’s control’(UK22). Similarly, the level of benefit or financial gain has also been referred to when determining the offence of forced labour.<sup>376</sup> However, it is unclear as to what extent this benefit is valued as a “constituent element” (UK4) or an aggravating factor (UK5) of the offence.

Similarly, the issue of consent is also a point of reference when it comes to the possibility of exiting exploitation, and the extent to which the victims are left with a lack of alternative (as discussed in Section 4). However, consent of the exploited party is irrelevant, even if the exploiter believes that their actions were implicitly consented to by the exploited parties continued presence. In two cases, the exploiters line of defence hinged upon the fact that they had provided better conditions compared to the alternative e.g. homelessness, destitution, lower wages in country of origin. However, in both cases the judges overruled any consideration of the fact that exploitation was better than any alternative, as asserted by the judge in UK30:

*You delude yourselves by suggesting that the life you offered was better than the life on the streets. That misses essential points:*

- *You deprived them of the ability to exercise free will, to make their own choice*
- *They were stripped of dignity and humanity – consigned to a life of drudgery*

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<sup>375</sup> UK6, BE05, BE10, BE13, BE35.

<sup>376</sup> UK4, UK9, UK16, UK24, UK25.

- *The product of their drudgery was your own enrichment, depriving them of the ability to make their own choices, provided you the ability to accumulate substantial wealth, your enrichment was on the back of their exploitation.*<sup>377</sup>

Similarly, in one case (BE3), the judge rejected the suggestion that exploitative circumstances in Belgium were still better than the situation they had known in their country of origin:

*That **the accused speculated that the income that would have been promised to the victims in their country of origin would have been equal to, or even lower than, the unworthy salary he paid them** in this case and the fact that the victims could not work lawfully in the kingdom and had, in fact, no choice but to work in these conditions to live [emphasis added].*<sup>378</sup>

Despite initial concerns regarding the inclusion of the principle of irrelevance of consent in law, discussed in Chapter 8, its application in practice aligns with the theoretical understanding of consent and can be characterised by an emphasis on the state of mind of the exploiter rather than the exploited party and an assessment of the situation in accordance with the objective standards of the country in which the exploitation takes place. In this regard, the practice in both jurisdictions affirms that the victim's assessment of a "win-win" situation is not relevant to criminal prosecutions. The focus should be upon the intention of the perpetrator and the objective standards of the country in which the exploitation takes place: as such consent is irrelevant.

## 7. Recognition of the totality of the situation (Element VI)

In both jurisdictions, **the judiciary give weight to the totality of the exploitation circumstances (before, during and after)**. Meaning, that it is not just the working conditions which are assessed, but also the background circumstances of the victim (before, during the exploitative situations and future prospects) and the living

<sup>377</sup> UK30 -Judge sentencing remarks.

<sup>378</sup> BE3- Unofficial translation, original text: "*Que le prévenu a spéculé sur le fait que les revenus qu'auraient promérités les victimes dans leur pays d'origine auraient été égaux, ou même inférieurs, au salaire indigne qu'il leur a payé en l'espèce ainsi que de la circonstance que les victimes ne pouvaient travailler licitement dans le royaume et n'avaient, en fait, d'autre choix que de travailler dans ces conditions pour vivre.*"

conditions. For example, in England & Wales, the prosecution place significant emphasis on evidence which demonstrates the totality of the situation e.g. in cases where victims are living in poor conditions, video recorded evidence or photographs of premises are helpful.<sup>379</sup> However, there are anomalies in the file study to the assessment of the factual circumstances, highlighting the subjectivity of judges and the shift in emphasis to the “actual exploitation”. For example, in England & Wales, a situation was qualified as forced labour, even though the working conditions were not exploitative *per se*, however, the behaviour of the defendant in controlling other aspects of the victim’s lives was key to the judge’s appreciation of the situation – including the control of bank accounts and the provision of squalid living conditions.<sup>380</sup> A final example demonstrates that where the defendant exercises control over both the working and living conditions, the situation can still be exploitative, even if the victim is not living in squalid conditions.<sup>381</sup>

The file study reveals that an assessment of exploitation must go beyond the working conditions. In the file study, the judiciary demonstrates a consideration of other elements such as living conditions, access to adequate level of subsistence (including food and clothing) and access to medical care. These points will be addressed in turn:

***Living Conditions.*** The obligation to live on the premises is one of three constituent elements of the offence of servitude. does not refer to the state of the living conditions. In England & Wales, the provision of accommodation on or near workplace, withholding of wages, threats or use of violence was shown to add to the isolation and dependence of the individual on the employer.<sup>382</sup> In Belgium, a number of cases required the individuals to live on site, and the abusive accommodation conditions were found to be contrary to human dignity.<sup>383</sup> It is interesting to note that in a number of cases, the court added that the obligation to live on the premises does not have to be exploitative *per se*. As a result, it is not necessary to “be living in squalor” or abusive living conditions (UK6, UK9). Ultimately, it is not necessary for the individuals to be

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<sup>379</sup> Bowen (2017), *supra* n.122, p.215.

<sup>380</sup> UK7, UK19, UK24, UK27, UK28, UK31; UK24 [poor living conditions, not exploitative working conditions].

<sup>381</sup> UK7, UK25 not living in squalor, BE20.

<sup>382</sup> UK1, UK3, UK4, UK5, UK6, UK7, UK12, UK14, UK16, UK21, UK22, UK23, UK27, UK30, UK31.

<sup>383</sup> BE3, BE4, BE5, BE8, BE10, BE14, BE16, BE20, BE21, BE24, BE35, BE27, BE28, BE30, BE32, BE33, BE36, BE38, BE41, BE47.

living in squalor, rather, the isolation and dependence that the provision of accommodation creates is the focus (UK7, UK25).

**Access to medical care.** The file study in England & Wales reveals, in a number of cases, where the assessment of the situation also refers to the provision or non-provision of access to medical treatment: denial of access to healthcare;<sup>384</sup> informal compensation mechanism for accident at work;<sup>385</sup> registration with doctor;<sup>386</sup> no registration with doctor (UK3); no sick leave/day off.<sup>387</sup>

**Subsistence needs.** Reference to the subsistence needs is extremely relevant where the individual is reliant upon the exploiter in the totality of the circumstances e.g. provision of food, accommodation, linguistic support, transport and financially. Instead, the extent to which subsistence needs are met or not are very much linked to the dependency on the exploiter and the amount of control they have over their life. Where subsistence is mentioned, it refers to a lack of sufficient levels of food, clothes and possibility to maintain good hygiene standards. Similarly, as with living conditions and access to medical care, exploitation can still occur despite access to sufficient quantities of food (UK9, UK15).

A final situation that emerged from the file study, which may appear to be paradoxical when discussing labour exploitation are circumstances wherein the **working conditions are normal but the living conditions are exploitative or vice versa**. In this regard, the judicial assessment of the totality of the situation reveals that it is not necessary for both living and working conditions to be exploitative, it can be one or the other. For instance, in one case, it was not the working conditions that were exploitative *per se*, especially where the work was conducted in the legitimate labour market:

*Whilst work was hard, V worked for legitimated companies, and his conditions of engagement were no different to other employees. He was provided with appropriate safety equipment and training; his shifts were no longer than other employees. He was*

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<sup>384</sup> UK1, UK12, UK4, UK20, UK28.

<sup>385</sup> UK19, UK28.

<sup>386</sup> UK1, UK15, UK20.

<sup>387</sup> UK1, UK22, UK28.

*not deceived as to nature of his employment before he arrived in UK – he knew it would be manual labour and that it would be hard work. The gravamen of the crime is that he was not paid the wages he was due for his work.*<sup>388</sup>

However, in recognition of the impact of the totality of the situation on the individual, despite the defence counsel seeking a ruling that such work could not lead to exploitation (also in UK30 & UK31), the judge qualified the situation as one of exploitation. Ultimately, the judges stated that such conditions exacerbate dependence and isolation which in turns impacts upon the restriction of freedom of movement and ability to change their situation.

## 8. Concluding Remarks

The analysis of the file study demonstrates that the judicial interpretation of the national jurisprudence has contributed to clarifying the material scope of labour exploitation. In this regard, the analysis of the judicial interpretation of domestic law has proven to be invaluable, especially in light of the lack of engagement by regional courts to further clarify the material scope of exploitation in the context of human trafficking and the three prohibited practices outlined in Article 4.<sup>389</sup>

Throughout this chapter we have built on the discussion in Chapter 6 and continued to demonstrate the extent to which the judicial interpretation of the elements of exploitation in law align with the analysis of the law and political theory in Parts I and II. We do discern significant alignment between law and theory, however, the legal elements of exploitation are, in certain circumstances, articulated differently. In summary, the file study has revealed, a number of **key constituent elements of labour exploitation in law** that are present in both jurisdictions. First of all, the role of the exploiter demonstrates that situations of labour exploitation are the result of the *knowing abuse of a position of vulnerability*. The relationship between the exploiter and the victim is characterised by the *exercise of control over the persons and/or their resources*, leaving the individual in a *position of dependence* where there is *a difficulty*

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<sup>388</sup> UK28 - defence submission on sentence, 1.6.17, para 5.

<sup>389</sup> See Stoyanova (2014), supra n.267 and Milano, V., 'The European Court of Human Rights' Case Law on Human Trafficking in Light of L.E. v Greece: A Disturbing Setback?', (2017) *Human Rights Law Review* 17, 701–727, p.711.

*to change their circumstances. Consent* of the exploited party, at any time, is *irrelevant*. The outcome of the situation, whilst it may or may not be (mutually) beneficial, is characterised by a *lack of respect for human dignity*. Finally, regard must be had to the *totality of the situation* (before, during and after exploitation). For instance, the circumstances of the exploitation itself does not only refer to working conditions (as they may not be exploitative *per se*) but also other factors such as living conditions.

Taking these elements into account, it is important to ensure that any legal conceptualisation of exploitation reinforces a “change of imagery”<sup>390</sup> in how a victim of labour exploitation is perceived, especially where there is evidence of consent or even initial solicitation of the employment, which has then led to a deterioration in the circumstances or the creation of the precarious situation.

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<sup>390</sup> Radeva Berket (2015), *supra* n.67, p. 360-361, p.364.

## **CHAPTER 10 - The judicial qualification of labour exploitation in law: the role of indicators**

### **0. Introduction and structure of the chapter**

Whilst the key elements of labour exploitation analysed in Chapter 9 are both illustrative of the judicial interpretation of the material scope of labour exploitation and crucial to the conceptualisation of labour exploitation in law that will be proposed in the next chapter (see Chapter 11), it is vital to acknowledge the practical way in which the judiciary qualifies the threshold of labour exploitation. With this in mind, this chapter discusses the juridical use of indicators, that cumulatively facilitate the assessment of a situation as exploitation (Section 1) and provide an example of how judges operationalise these indicators when assessing the severity of the exploitation when imposing a sentence (Section 2). To date the analysis has emphasised the judicial interpretation of the law in practice and the extent to which that aligns with the legal and theoretical analysis in earlier Parts of this thesis (Chapter 9), however in this chapter we seek to highlight the role of a judge's subjective assessment of the facts before them when determining the threshold of exploitation. The chapter outlines two instances where the judge qualified the factual circumstances in front of them: first, when determining the *nature* of exploitation (does it exist or not) and secondly, the *degree* of exploitation (the severity or harm). This discussion goes beyond the interpretation of the law, and indeed is also applicable to other actors who play a role in the administration of the criminal justice process, such as law enforcement

authorities, prosecutors, etc., depending of the organisation of the criminal justice system in a given State.

## 1. The judicial use of indicators to qualify the nature of labour exploitation

We acknowledge that this chapter presents a nuanced perspective of the law in action. However, the inclusion of these emergent findings is of importance as they reveal that ultimately, in practice, the qualification of a situation as labour exploitation is achieved by the courts expressing their subjective assessment of the situation with reference to “indicators.”<sup>391</sup> In particular, the courts use such indicators as grounds for their judicial reasoning when deciding whether elements of the material scope of exploitation can be derived from the factual circumstances, including for instance, the exercise of control or the existence of coercion.<sup>392</sup>

The England & Wales file study reveals that both the judiciary and the prosecution frequently make reference to indicators when interpreting the factual circumstances in order to determine the existence of exploitation (UK1):

*Consider all circumstances: [...] Levels of pay – if you conclude that the only failing here was to pay less than should have been paid then the offence is not proved; Hours of work; Consent; Working conditions; Contract of employment/employment rights; Food; Debt; Living conditions; Use or threat of violence; Freedom of movement; Access to/availability of identity documents; Benefit payments – how were they claimed – where did the money go; Workers vulnerabilities -help or exploitation.*<sup>393</sup>

The same is the case for Belgium where, as discussed in Chapter 8, the threshold of exploitation is ‘defined’ as working and living conditions contrary to human dignity, the meaning of which is clarified in the *travaux préparatoires*’ non-exhaustive list of indicators that were outlined in Chapter 8.<sup>394</sup> These indicators are operationalised by the judiciary in order to determine the ‘level of quality of life protected by respect for

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<sup>391</sup> Circular n° COL 10/2004 (2004), supra n. 230, annex, pp35-38.

<sup>392</sup> Judges: UK5 – FCL, UK7 – Servitude, UK23 – FCL, UK30 – FCL; Prosecution: UK1 – FCL, UK4 – FCL, UK5 – FCL and servitude, UK6 – FCL and servitude, UK12 – FCL, UK19- FCL, UK24 – FCL,

<sup>393</sup> UK30 – Judge’s summing up

<sup>394</sup> Exposé des motifs du Projet de loi du 14 janvier 2005 modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains, (Doc. Parl. St. Chambre, 2004-2005, DOC 51 1560/001), p. 19.



others and a human existence whose basic preventions are guaranteed.’<sup>395</sup> It is important to note that the operationalisation of these factors is subjective: ‘The judge shall, with [their] personal knowledge and appreciation of the degree of comfort and social protection to which a worker is entitled, determine whether or not the conditions of employment are contrary to human dignity on basis of the evidence.’<sup>396</sup>

The following tables illustrate the operationalisation of the “indicators” in the file study and exemplify the need for a combination of factors that relate to both living and working conditions in order to be considered as exploitation. Very seldom will single factors alone lead to a conclusion that a situation amounts to exploitation.

	UK1	UK4	UK5P <sup>397</sup>	UK5J <sup>398</sup>	UK6	UK7	UK12	UK19	UK23	UK24	UK30
Hours worked	X	X	X	X	X		X	X	X		
Non-payment or withholding of wages	X	X	X	X	X		X	X	X		X
Restriction of freedom of movement	X	X	X	X		X			X <sup>399</sup>	X	X
Retention of identity documents	X	X	X							X	X
Isolation	X	X	X	X	X		X <sup>400</sup>			X	
Psychological fear							X				
Exercise of control	X <sup>401</sup>		X <sup>402</sup>			X <sup>403</sup>	X			X <sup>404</sup>	X <sup>405</sup>
Use or threat of violence			X	X		X	X			X	X
Obligation to live on premises						X <sup>406</sup>					
Non-payment of social security, tax		X	X		X			X <sup>407</sup>			X <sup>408</sup>

<sup>395</sup> BE13, BE32, BE35, BE47. See also Court of Cassation case referring to the notion of human dignity. Cass. P.12.0107. N, 5 Juin 2012 cited in Clesse et al (2014), supra n.211, p. 27. Unofficial translation, original text: “niveau de qualité de vie protégé par le respect des autres et à une existence humaine dont les préventions de base sont garanties.”

<sup>396</sup> Clesse et al (2014), supra n.211, p. 29. Unofficial translation, original text: “une appréciation subjective de la situation. Le juge devra avec sa connaissance personnelle et son appréciation du degré du confort et de protection sociale quel à droit un travailleur, déterminer si les conditions d’emploi sont ou non contraires à la dignité humaine grâce à la réunion de faisceau d’indices.”

<sup>397</sup> UK5P = prosecution operationalisation of indicators.

<sup>398</sup> UK5J = judge operationalisation of indicators.

<sup>399</sup> Tried to escape.

<sup>400</sup> Deprivation of contact with family.

<sup>401</sup> Physical exercise of control.

<sup>402</sup> Financial exercise of control: Deprivation of legitimate and alternative sources of income, namely state benefits.

<sup>403</sup> Opening of bank accounts and other fraudulent practices.

<sup>404</sup> email address, bank cards, subsistence – reliant for food, debt.

<sup>405</sup> Financial exercise of control: Debt.

<sup>406</sup> Food and accommodation.

<sup>407</sup> Kept off the books, not on payroll.

<sup>408</sup> Retention of benefit payments.

Absence of contract of employment		X	X					X			X
Nature of accommodation		X	X	X	X		X		X		X
Non-provision of adequate equipment		X	X	X	X		X	X <sup>409</sup>			
Provision of clothing			X				X				
Non-provision of info on workers' rights		X	X					X			
Misleading info about job and pay		X								X	

**Table 13: Operationalisation of indicators of exploitation in England & Wales file study**

	BE2	BE4	BE5	BE6	BE8	BE11	BE16	BE17	BE18	BE21	BE24	BE26
Precarious living & working conditions		X	X			X	X			X	X	
Non-payment or withholding of wages		X	X	X		X	X		X	X	X	
Non-payment of regular wages			X		X		X	X		X		
Lack of social security protection		X	X			X	X			X		X
Dependence upon employer			X				X					
Excessive hours	X <sup>410</sup>			X	X	X	X		X		X	
Impossibility to claim recognition employment rights			X				X					
Lack of health and safety at work				X	X			X				
Physical and verbal abuse					X							
Precarious living conditions						X						

**Table 14: Operationalisation of indicators of conditions contrary to human dignity in Belgium file study**

In England & Wales, it is for the jury to decide whether or not these indicators amount to exploitation and the reasoning and elements considered by the jury to reach a verdict are not disclosed. Therefore, it is not possible to provide concrete examples

<sup>409</sup> Cash compensation for accident at work.

<sup>410</sup> No days off.

of their operationalisation when it comes to determining guilt. However, the indicators are used by the prosecution when presenting the factual circumstances of the case (UK5). When determining the “severity” of the exploitation in sentencing remarks, judges refer to a list of (non-exhaustive – UK5) indicators that justify the imposition of the sentence. For example, in UK21, the judge’s sentencing remarks refer to heavy manual labour, long hours, no sick pay, no record of employment, invisibility of workers to authorities, degrading treatment and lack of self-respect, substantial profit of the defendants.

By contrast, in Belgium, where the judge has to motivate their decision in their verdict when determining the existence of exploitation, it is possible to provide a brief overview of the operationalisation of the instrumentalisation of indicators. Overall, as demonstrated, a combination of factors pertaining to the working and living conditions are required to determine whether a situation is contrary to human dignity (see table above). However, anomalies do exist. For instance, in one case, the court held that the working conditions alone were an attack on human dignity (BE18):

*According to the Court of Cassation, the “work performance” falls within the scope of the criminalisation of trafficking, provided that the person employed is impaired in his or her dignity, regardless of the duration of this impairment.*<sup>411</sup>

Similarly, another outlying example is where the court held, on two occasions, that an accident at work and the subsequent response of the defendant, was considered to be sufficient for the situation to amount to [working] conditions contrary to human dignity:

*The occupation of Mr (...) took place in conditions contrary to human dignity from the moment he suffered a serious accident at work.*<sup>412</sup>

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<sup>411</sup> Myria (2016), supra n.71, p. 153-154. Unofficial translation, original text: “Selon la Cour de Cassation en effet, la « prestation de travail » entre dans le champ d’application de l’incrimination de traite dès lors que la personne occupée à travailler est atteinte dans sa dignité, et ce quelle que ce soit la durée de cette atteinte.”

<sup>412</sup> BE34 - Unofficial translation, original text: “L’occupation de Monsieur (...) s’est déroulée dans des conditions contraires à la dignité humaine à partir du moment où il a été victime d’un grave accident du travail.” See also FRA research where workers had access to medical assistance withheld following accidents at work, FRA (2019), supra n.22, p. 48.

BE41 - Unofficial translation, original text: “Au niveau moral dans le chef du recruteur, il suffit de démontrer que les conditions de travail sont contraires à la dignité humaine pour que l’infraction soit consommée.”

In one case, the commission of prostitution related offences was sufficiently an affront to human dignity to amount to putting someone to work in “conditions contrary to human dignity” within the meaning of *Article 433 quinquies* (BE45).<sup>413</sup> With this in mind, and taking into account the lack of any other cases dealing with the prostitution milieu, there does appear to be a conceptual distinction made between human trafficking for the purposes of sexual exploitation and human trafficking for the purposes of economic exploitation. However, as this is the only case of its kind in the file study, and in the absence of any other cases in this regard, it is difficult to draw a concrete conclusion on this point.

In one case, whilst the wages were not low, the combination of the requirement to live and work in the same place, where living conditions were poor, amounted to conditions contrary to human dignity (BE20). Similarly, the courts have held on numerous occasions that neither retention of identity documents (BE13 & BE35) nor restriction of movement is necessary (BE13, BE28, BE35). However, in this regard, there is one case where the judge ruled that the fact that the workers had that the identity documents had not been retained and the freedom of movement was one of the indicators of **no** exploitation (BE22).

Four cases led to acquittals as the judge determined that the working and living conditions were not contrary to human dignity.<sup>414</sup> Overall, the non-payment of wages did not suffice for the conditions to be assessed as contrary to human dignity, in conjunction with extended hours and accommodation on site of work for 4 days and lack of safety equipment.<sup>415</sup> Similarly, in BE22, the Court of Appeal acquitted the defendant of human trafficking,<sup>416</sup> as the lack of a contract, no fixed hours, non-payment of minimum wage and accident at work were not sufficient to establish the offence. For example, the long hours, non-payment of wages and one isolated and undetailed declaration by one victim of lack of security was not sufficient to be held to be contrary to human dignity (BE19).

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<sup>413</sup> Article 380 Criminal Code prostitution related offences were listed on the indictment in BE45. Unofficial translation, original text : “*de permettre la commission contre cette personne des infractions prévues aux articles 379, 380, §1 et 4, 383 bis et de mettre au travail ou de permettre la mise au travail de cette personne dans des conditions contraires à la dignité humaine.*”

<sup>414</sup> BE2, BE19, BE22 – on appeal, BE37.

<sup>415</sup> BE19 – Unofficial translation, original text: “*il n'est pas suffisamment établi que les travailleurs M.M., M.A. et A.M. ont travaillé pour le prévenu B.A. dans des conditions contraires à la dignité humaine. En effet, le seul fait de travailler un grand nombre d'heures et de ne pas avoir reçu l'intégralité de la rémunération qui était due.*”

<sup>416</sup> NB social criminal offences were retained and the custodial sentence was reduced to a fine.

### *i) Non-payment of minimum wage as a key indicator of exploitation*

One indicator that deserves further attention due to its emphasis by the judiciary in both jurisdictions, is the non-payment of a minimum wage. Before moving to the judicial handling, it is important to note that, in England & Wales, non-payment of national minimum wage and national living wage, is a criminal offence, but is not included on the indictment of the cases in the file study.<sup>417</sup> Whilst the opposite approach is adopted in Belgium, where the alleged social criminal offences appear on the same indictment as human trafficking and are considered as part of the same proceedings.<sup>418</sup> In England & Wales, the non-payment of minimum wage is an evidentiary consideration but not an ‘acid test’.<sup>419</sup> In Belgium, the assessment of the appropriate level of pay was either determined according to the national minimum wage<sup>420</sup> and/or, as the majority of cases involved illegal work, the remuneration of works was compared to that of a worker, with a regular employment status, in the same work, with the same tasks and hours (BE16 & BE21).

Generally, in both jurisdictions, it is accepted that the non-payment of minimum wage alone is not sufficient to qualify a situation as exploitation.<sup>421</sup> However, a few anomalies do arise from the Belgian file study. In one case, the non-payment of wages alone was sufficient to amount to exploitation (BE3), and in another case, despite normal working conditions, the non-payment of wages amounted to working conditions contrary to human dignity (BE39). Conversely, in one case, the wages were paid as normal, however, the judge determined that the working conditions amounted to conditions contrary to human dignity e.g. the hours worked, the necessity to be accommodate on site in bad conditions, and the lack of safety equipment (BE20).

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<sup>417</sup> Section 31 National Minimum Wage Act 1998, The National Minimum Wage Regulations 2015, No. 621, see Criminal Law enforcement policy and General Criteria for Prosecution Cases in Department for Business, Energy and Industrial Strategy, *National Minimum Wage Law: Enforcement Policy on HM Revenue & Customs enforcement, prosecutions and naming employers who break National Minimum Wage law* (November 2017), pp. 14-20. There are civil enforcement options that can be applied, not just criminal proceedings, however it is not possible to determine from the file study whether or not civil proceedings were undertaken.

<sup>418</sup> BE1, BE2, BE7, BE8, BE12, BE23, BE24, BE25, BE27, BE29, BE30, BE33, BE34, BE35, BE36, BE39, BE41, BE42, BE44, BE45, BE47.

<sup>419</sup> UK1 see also UK4, UK8, UK19, UK21, UK30.

<sup>420</sup> BE1, BE6, BE13, BE18, BE22, BE31, BE35, BE41, BE45.

<sup>421</sup> *R v SK* [2011] EWCA Crim 1691, para 26 (UK1). Kurz (2008), supra n.160, p. 317 - 330, p. 327. – cited in BE13 and BE41.

Low level of pay or non-payment of minimum wage holds significant evidentiary importance.<sup>422</sup> For instance, in England & Wales, the level of pay may point to coercion (UK4 & UK5), inability to change circumstances (UK5) and involuntariness of work (UK21). This was affirmed by the Court of Appeal:

*Where it is alleged that one person has been compulsorily employed by another, the level of pay he or she has received, if any, may have evidential importance. It may point to coercion; it may bear on an employee's ability to escape from his or her employer's control. On its own, however, a derisory level of wages is not tantamount to coercion.*<sup>423</sup>

By virtue of the positioning of the prohibition of labour exploitation in the criminal law, the behaviour must reach a particular level of severity i.e. criminal, for it to be classified as exploitation. As a result, non-compliance with labour laws will not suffice. In determining whether or not such criminal behaviour exists, this section has shown that regard must be had to the totality of the situation and not just the working conditions. Furthermore, in order to assess the existence of exploitation, the courts will resort to the use of indicators. This was exemplified by the judicial assessment of the non-payment of wages in the file study which showed that whilst it may be that a single factor alone is not, in most cases, sufficient for exploitation. Instead, a combination of factors or indicators are needed to demonstrate whether or not exploitation has occurred.

Once the courts – or in the case of England and Wales the jury – have assessed the existence of exploitation, an emerging issue from the file study was the second stage that will require an assessment of the severity of the situation (the degree).

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<sup>422</sup> UK1, UK4, UK5, UK12, UK21, UK23, BE13, BE24 (Appeal), BE41. See also FRA research findings with worker's where issues with pay was identified as one of the main labour law violations in cases of severe labour exploitation, in FRA (2019), supra n.22, pp.42-45.

<sup>423</sup> *R v SK* [2011] EWCA Crim 1981, para. 42 (UK1).

## 2. The judicial assessment of the degree of labour exploitation

An emerging issue from the comparative analysis of the national legal orders is the judicial understanding of the *degree* of exploitation.<sup>424</sup> So far in this thesis, we have focused upon the judicial interpretation of the concept according to the *nature* of the exploitation (i.e. does it exist or not), whereas the file study analysis reveals that the judicial assessment of exploitation is in fact twofold. First, the circumstances are considered to determine whether or not exploitation *exists (nature)*, followed secondly by an assessment of the *severity (degree)* of the exploitation for the determination of the sanction.<sup>425</sup> The emphasis in this chapter on the degree of exploitation is premised upon the broader discussion regarding the positioning of exploitation in criminal law. The criminalisation of exploitation reflects the severity of the illicit conduct, which was noted by the Court of Appeal in *R v Connors* [2013] EWCA Crim 324, whereby the judge held that the imposition of a custodial penalty seeks to emphasise the role of the criminal law in providing protection to those who are vulnerable to exploitation.<sup>426</sup>

This section will consider the assessment of the severity of exploitation, by providing an overview of the application of sentences by the judiciary, and the types of factors that are taken into account to determine the severity of the situation. The imposition of a sentence is decided by the judge taking into account the culpability of defendant, the harm caused to victim(s), the circumstances of the case, the impact of crime on victims, relevant case law, seriousness of crime and previous convictions of the defendant. Overall, the sentence must be fair, in accordance with the gravity of the offence and particular circumstances of offender e.g. suspended sentence of the defendant due to ill health/age in UK1. The sentence may be increased or decreased by aggravating or mitigating factors.

### 2.1. The (non-)existence of sentencing guidelines for labour exploitation

Sentencing guidelines are often provided to the judiciary to assist in determining the degree of culpability of the defendants and the harm caused to the victim, once it has

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<sup>424</sup> We note that the degree of exploitation is not just relevant to the judges' imposition of a penalty but also during prosecutorial and investigative stages, as highlighted by Gallagher in Gallagher (2017), *supra* n.358, p. 103.

<sup>425</sup> Bowen (2017), *supra* n.122, p.219.

<sup>426</sup> *R v Connors* [2013] EWCA Crim 324, para 10.

been found that the necessary elements of the offence are sufficiently established. In England & Wales, there are no official sentencing guidelines for labour exploitation offences: a gap which has been critiqued with calls for updates to the Sentencing guidelines and the Crown Court Bench Book to encompass directions on law on the *Modern Slavery Act 2015*.<sup>427</sup> In the England & Wales file study, the lack of sentencing guidelines was considered to be problematic (UK25). However, the appellate case of *Attorney-General's Reference Nos 37, 38 and 65 of 2010 (R v Shahnawaz Khan & Ors) [2010] EWCA Crim 2880*<sup>428</sup> is recognised as setting a precedent on an established list of sentencing factors, which, in the absence of official sentencing guidelines are 'a measure of assistance' as the 'court offered an analysis of some of the relevant factors which might assist in the assessment of the seriousness of the offence.'<sup>429</sup> The Court of Appeal held that the following factors should be considered when assessing the seriousness of the offence:

- (1) The nature and degree of deception or coercion exercised upon the incoming worker. Coercion will be an unusual aggravating feature in a case of economic exploitation. The gravamen of the offence committed against economic migrants is the deceitful promise of work on favourable terms;*
- (2) The nature and degree of exploitation exercised upon the worker on arrival in the work place. This will involve a consideration both of the degree to which what is promised is in fact denied on arrival and the extent to which treatment in the work place offends common standards within the United Kingdom;*
- (3) The level and methods of control exercised over the worker with a view to ensuring that he remains economically trapped;*
- (4) The level of vulnerability of the incoming worker, usually economic but also physical and psychological;*
- (5) The degree of harm suffered by the worker, physical, psychological and financial;*
- (6) The level of organisation and planning behind the scheme, the gain sought or achieved, and the offender's status and role within the organisation;*
- (7) The numbers of those exploited;*
- (8) Previous convictions for similar offences.*<sup>430</sup>

<sup>427</sup> Percival (2013), supra n. 165, pp. 3-4; Haughey, C., *Independent report, Modern Slavery Act 2015 review: one year on* (2016), p.8 & p.24.

<sup>428</sup> *Attorney-General's Reference Nos 37, 38 and 65 of 2010 (R v Shahnawaz Khan & Ors) [2010] EWCA Crim 2880* referenced by judges in UK3, UK17, UK20, UK24, UK31; UK1 - *R v SK* [2011] EWCA 1691 referenced by judges in UK24, UK23, UK12, UK 5, UK30, UK31.

<sup>429</sup> Percival (2013), supra n. 165, p.3-4.

<sup>430</sup> *Attorney-General's Reference Nos 37, 38 and 65 of 2010 (R v Shahnawaz Khan & Ors) [2010] EWCA Crim 2880*, para 17.



These factors have been further operationalised and explicitly acknowledged by the courts in all file study cases, not just human trafficking cases, but also cases involving the standalone offences.<sup>431</sup> Since then, subsequent appeal judgments, have been of ‘considerable assistance and guidance’ for first instance judges when considering the sentencing.<sup>432</sup> Other sources have also been considered of relevance in terms of providing guidance in this regard.<sup>433</sup> In England & Wales, a number of aggravating factors have been explicitly highlighted in sentencing remarks: the deliberate targeting/recruitment (UK18); the profits gained (UK5); the degradation and abuse of power (UK30); the deceitful promise of work on favourable terms (UK24).

A specific point of reference when sentencing, in England & Wales, is the hierarchical nature of the offences. As with the material scope of the offences (as described above) a discussion of the application of the hierarchical understanding of exploitation is necessary when it comes to sentencing. For instance, the fact that the offences of exploitation are “not mutually exclusive” means that the sentence for forced labour can be higher than a sentence for servitude. Whilst, some judges questioned this position stating that the sentence should respect the hierarchy (UK4 & UK5), the Court of Appeal, in 2013, held that the sentences can in fact be higher for forced labour than for servitude or slavery.<sup>434</sup>

In Belgium, the means are understood as aggravating factors that are considered when sentencing as well as a number of factors that emerge from the file study: including the financial benefit sought; the application of the situation to a modern setting; the lack of respect for the human dignity of the individual; the agency of the victim in creating the situation of precarity / and knowingly working illegally;<sup>435</sup> the abuse of the position of vulnerability of the individual, leading to a lack of an

<sup>431</sup> UK3, UK4, UK5, UK7, UK12, UK14, UK15, UK17, UK20, UK23, UK24, UK30, UK31.

<sup>432</sup> *Attorney-General's Reference Nos 2, 3, 4 and 5 of 2013 (R v Connors & Ors)* [2013] EWCA Crim 368 (UK4) referred to in UK7, UK 15, UK21, UK28, UK30, UK31; *R v Connors EWCA Crim 324* [2013] (UK5) referred to in UK21, UK28; *R v Joyce* [2017] EWCA Crim 337 [UK17] referred to by UK28, UK30; *Attorney-General's Reference 2017 Re Zielinski* [2017] EWCA Crim 758 referred to in UK31.

<sup>433</sup> UK5 - Sentencing remarks of the first instance case in UK4, UK24[prosecution counsel]; UK28 - reference to appeal case *R v Mohammed Rafiq* [2016] EWCA Crim 1368 [UK19], UK31 - reference to Blackstone's criminal practice 2017 – para b2.208.

<sup>434</sup> *R v Connors* [2013] EWCA Crim 324, para 8 cited in UK17. NB in Australia the maximum sentence for slavery is 25 years imprisonment and for servitude is 15 years. Distinctions between the offences, reflected in the penalty imposed by the legislative. John Chelliah, J., ‘Labour exploitation: Recent examples from Australia’, (2016) *Human Resource Management International Digest*, 24(3), 4-6, p.4.

<sup>435</sup> 2010-2015 only after 2017, agency of victim is NOT relevant to determination of compensation.

alternative; the wider societal impact such as impact on labour market, unfair competition for legitimate employers, encouragement of illegal working, fraud;<sup>436</sup> the precarious situation of the defendant e.g. “historic” human trafficking victim (BE9), same vulnerable position as the victim (BE17); and the lack of safety at work (BE8).

In one case in Belgium, the defendant had previously received victim status, as she had been identified as a victim of human trafficking. The court permitted a partial stay as a mitigating factor, taking into account that she was still in a situation of debt-bondage:

*However, account will be taken of the lack of a known criminal record of the defendant and of the fact that she may have been obliged, having herself been a victim of exploitation and trafficking in human beings, to find herself another source of income in order to pay back those who, at another occasion, had abused her precarious situation. It is therefore justified to grant her a partial suspension, as specified in the operative provisions of this judgment, the defendant being in legal conditions in order to benefit from this measure. (BE9)<sup>437</sup>*

In England and Wales, the sentencing takes account of the admissibility of circumstances prior to 6 April 2010 (date of entry into force of S71).<sup>438</sup> The situation is not so clear in Belgium, for instance, in BE11, the courts took “the length of the overall unlawful period” into account as an aggravating factor when sentencing (2001-2008); whereas, in BE13 the non-retrospective application of the law was applied to a case where the factual circumstances existed before the entry into force of the human trafficking offence (1 March 2003). The court held that only the facts from 12 September 2005 onwards would be admissible. In BE36, the court amended the indictment for three of the civil parties where the indictment period preceded the entry into force of the law of 10 August 2005 which introduced article 433 into the penal code. As a result, the court had to determine facts on the basis of Article 77 of the Law of the 15 December 1980 on the access to the territory, residence, establishment and alienation

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<sup>436</sup> In BE2 court referred to the extent of the fraud imposed by the defendant.

<sup>437</sup> BE9 – Unofficial translation – Original text: “Il sera cependant tenu compte de l’absence d’antécédents judiciaires connus dans le chef de la prévenue et du fait qu’elle ait pu être amenée, ayant elle-même été victime de traite et de trafic des titres humains, à se trouver une autre source de revenus afin de pouvoir indemniser ceux qui, à une certaine époque, avait abusé de sa situation précaire à elle. Il est dès lors justifié de lui accorder un sursis partiel, tel que précisé au dispositif du présent jugement, la prévenue étant dans les conditions légales pour pouvoir bénéficier de cette mesure.”

<sup>438</sup> UK6, UK12, UK15, UK21, UK22, UK23. UK30

of foreigners, where it was necessary to determine whether the defendant had contributed to the entry and residence in Belgium – e.g. human smuggling. For all three victims, as they were already present in Belgium and approached the defendant looking for work, the constituent elements of the smuggling offence had not been established.

## **2.2. Imposition of a penalty**

Since the judiciary consider labour exploitation to amount to criminal behaviour, a custodial penalty is always applied. In England & Wales, there are a handful of exceptions where the courts handed down suspended sentences even though the defendants were found guilty of trafficking or standalone offences, in one case due to ill health (UK1), and in two cases one of the defendants who had been involved in the fraudulent criminal activity (UK14 & UK23).

In England & Wales, the length of the custodial sentence evolves throughout the sample. A trend of increasing penalties can be discerned from the file study, which corresponds to the legislative reform which increased the penalty from 14 years to life imprisonment, as well as the extensive attention paid politically and in public discourse to “modern slavery” and a shift in the societies collective consciousness to not tolerate exploitative conduct (UK24).

*It may be that society and government have been slow to wake up to this pernicious wrongdoing, but society and government have woken up – the relevant law – now known as modern slavery legislation – came into force in 2010. And the jury’s verdict made it crystal clear that society regards what was going on as completely unacceptable* (UK30 – Judge’s sentencing remarks)

Overall, the average length of a custodial sentence for modern slavery convictions is short (4 years’ imprisonment between 2014-2016)<sup>439</sup> and ‘some sentences have been regarded as derisory given the seriousness of the offences.’<sup>440</sup> However, a recent appeal case noted the increased maximum sentence under the

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<sup>439</sup> National Audit Office, *Report by the Comptroller and Auditor General Home Office Reducing modern slavery* HC 630 SESSION 2017–2019 (15 December 2017), p. 44-45.

<sup>440</sup> Craig (2017), *supra* n.136, p.21.

*Modern Slavery Act 2015* to life imprisonment and duly increased the sentence handed down at first instance from four years' to seven years' imprisonment.<sup>441</sup>

In contrast, as the maximum custodial sentence is five years, the custodial penalties handed down in Belgium are much lower. In addition, to the difference in maximum sentence, a number of factors could explain such a distinction. First of all, the duration of the offence is much shorter in Belgium, whereas in England & Wales, sometimes the indictment period is more than 10 years. However, it also be must recognised that the length of the sentence imposed does vary by taking into account other factors, such as i) the harm suffered to the individual or ii) the type of exploitation. For example, in BE39 the exploitation lasted seven years and the custodial sentence was 20 months, whereas in BE40, the exploitation lasted a couple of days, but the worker suffered significant physical harm leading to a four-year custodial sentence. In BE15, a case involving forced begging with an indictment period of 18 months, the sentence imposed was six years, despite an average sentence of approximately 18 months. Parallels can be drawn here with the England & Wales, where in some instances a very high penalty was imposed in situations where the duration was very short, but the type of exploitation involved sexual offences and/or forced prostitution. For example, in UK25, a case involving forced labour as prostitution, the indictment period was less than six months, but the sentence imposed was significant for both defendants: 13 years 6 months and 8 years 5 months respectively.

In both jurisdictions, the judge's order subsequent restrictions on the defendants, following their custodial sentence: Serious crime prevention order (pre-2015) (UK4 & UK5), Slavery Trafficking Prevention Orders (post-2015),<sup>442</sup> Restrictions and Restraining orders.<sup>443</sup> In both jurisdictions, the conditions of the prohibitions relate to restrictions in employing, managing, owning businesses, properties, recruiting workers and managing bank accounts for third parties who are not family members.

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<sup>441</sup> National Audit Office, *Report by the Comptroller and Auditor General Home Office Reducing modern slavery* HC 630 SESSION 2017–2019 (15 December 2017), p. 44–45.

<sup>442</sup> UK19, UK21, UK23, UK24, UK25, UK28, UK31. On use and role of serious crime prevention orders see evidence given by Ian Cruyton, Director of the organised crime command for the National Crime Agency HC, *Public Bill Committee Modern Slavery Bill [First Sitting]*, 21 July 2014, Cols 145–206, p. 6–7; The Anti Trafficking monitoring group (2018), *supra* n. 97, p. 40.

<sup>443</sup> BE01, BE03, BE06, BE07, BE09, BE11, BE12, BE14, BE15, BE16, BE18, BE20, BE21, BE22, BE24, BE26, BE34, BE43, BE46.

### 2.3. Judicial weight afforded to the lucrative outcome of exploitation: an aggravating factor?

In both jurisdictions, the file study clearly demonstrates that the outcome sought of the exploitation is a financial benefit;<sup>444</sup> namely, the criminal benefit of the non-payment of wages,<sup>445</sup> commercial benefit/gain, competitive advantage [BE]. In Belgium, the lucrative aim [*but de lucre*] is a significant factor when sentencing. Similarly, in England & Wales, the judges will consider when sentencing the aim of significant financial benefit and ‘the ability to accumulate substantial wealth, your enrichment was on the back of their exploitation’ (UK30). The lucrative aim of the exploitation enterprise is clear from the *modus operandi* of the exploiters in the targeted recruitment of particular type of workers.<sup>446</sup> In Belgium, targeted recruitment of undocumented workers meant that they can be paid less and disciplined with promises of regularisation and threats of denunciation to authorities:

*The defendants have benefited from a workforce which, having left his/(their?) country in search of a better salary, is placed in a clandestine situation, at the mercy of the requirements of the recruiter, accepting conditions that a worker regularly installed and employed on the territory would not tolerate.*<sup>447</sup>

The defendants deliberately recruited the victims in close proximity to closed reception centres, suggesting at a level of foresight in relation to their vulnerability brought about by their illegal administrative status.<sup>448</sup> Similarly, in England & Wales, the defendants targeted the recruitment of homeless/destitute workers with drug and alcohol dependencies with the offer of work, accommodation, food and wages:<sup>449</sup>

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<sup>444</sup> “a business of economic exploitation. The motivation was financial.” [para 14], “the offender’s motive was greed and commercial gain.” [para 21] in *AG Ref Nos. 37, 38 and 65 of 2010* [2010] EWCA Crim 2880.

<sup>445</sup> Intention to achieve maximum profit “le but de lucre”/financial benefit referred to in UK3, UK4, UK5, UK6, UK8, UK9, UK14, UK19, UK23, UK 24, UK25, UK27, UK28, UK30, UK 31; Intention to achieve commercial advantage/competition referred to in UK7.

<sup>446</sup> Chelliah describes targeted recruitment of vulnerable and sometimes desperate people as a “predatory or exploitative business practice” in Chelliah (2016), supra n.434.

<sup>447</sup> BE1 - Unofficial translation, original text: “les prévenus ont profité d’une main-d’œuvre qui, ayant quitté son pays à la recherche d’un meilleur salaire, se trouve placée dans une situation clandestine, à la merci des exigences du recruteur, acceptant des conditions qu’un ouvrier régulièrement installé et employé sur le territoire ne tolérerait pas.”

<sup>448</sup> BE13, BE30, BE31, BE36, BE40, BE44, BE45.

<sup>449</sup> Homeless, alcohol and drug problems, unemployed – vulnerable adult males [UK4]; Specific/targeted selection of vulnerable people by D [UK5]; homeless/unemployed vulnerable adult men [UK6, UK23, UK30]; Specific/targeted selection of vulnerable people by D, prepared to work for limited pay, Isolation and personal characteristics [UK12]; Specific/targeted selection of vulnerable people by D, prepared to work for limited pay, Isolation and personal characteristics = unlikely to inform police [UK21]; Ideal targets – poor background. [UK25, UK27, UK28]; Poor rural background, and homeless [UK31]. See discussion on characteristic of the individuals that made them vulnerable to exploitation and impact of these characteristics on the criminal justice process in Bowen (2017), supra n.122, p.220.

*You preyed on men who for a variety of reasons had fallen on hard time. Men who had become homeless, alcoholic, men with mental health problems. Men who for a variety of reasons, and to varying degrees, were vulnerable and easy to manipulate. Once located you exploited their natural desire to find, useful employment, somewhere to regard as home, simple in society – even the society you offered. Often these men were picked off the streets – you would drive around find people in the locality of hostels and night shelters, or those simply sleeping rough. [UK30 – Sentencing remarks]*

Does the judicial emphasis on the lucrative outcome of exploitation mean that it is a necessary requirement for human trafficking? For example, in one Belgian case (not included in case study due to language restrictions), the court acquitted the defendant because ‘the elements of the investigation did not establish that this situation had benefited the accused.’<sup>450</sup> Moreover, the emphasis on the financial aim/outcome of the exploitation confuses human trafficking with human smuggling, where the financial aim is a key feature of the former, but not necessary for the latter, where ‘even in the absence of a financial aim [human trafficking] must be made punishable.’<sup>451</sup> For Vermeulen, the emphasis on financial profit demonstrates a shift in the Belgian approach away from the international and European consensus.<sup>452</sup>

#### **2.4. Judicial assessment of the victim’s agency when calculating material and immaterial damages: a mitigating factor?**

In England & Wales, the calculation of proceeds of crime does consider loss of earnings as part of the assessment of the criminal benefit, however the compensation orders rarely reflect the payment of unpaid wages.<sup>453</sup> Overall, the file study of England & Wales demonstrates a low award of compensation, which is consistent with overall compensation awards for victims of human trafficking: there have only been 11

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<sup>450</sup> Corr. Gand (19e ch.), 6 avril 2009, T.G.R., 2009, p. 277 cited in Chronique semestrielle de jurisprudence, *Revue de Droit Pénal et de Criminologie* (2010), p.588. Unofficial translation, original text: “les éléments de l’enquête n’ont pas permis d’établir que cette situation avait profité au prévenu.”

<sup>451</sup> Vermeulen (2006), *supra* n.55, p 20-21.

<sup>452</sup> Vermeulen (2006), *supra* n.55, p 20-21.

<sup>453</sup> UK1, UK3, UK4, UK5, UK6, UK7, UK9, UK14, UK16, UK17, UK21, UK22, UK23, UK24, UK25.

compensation orders between 2014-2016.<sup>454</sup> In contrast, in Belgium, the award of both pecuniary and non-pecuniary compensation and the calculation of payment of back wages is much more common.<sup>455</sup> However, it is important to note that the Belgian judiciary has nevertheless emphasised the agency of the individual when discussing the degree of exploitation and the imposition of sentencing or compensation orders. In particular, the earlier cases in the file study revealed that the judiciary gave weight to the exploited party's so-called contribution to creating such a precarious position in the context of an illegal administrative status. As such, when determining the pecuniary and non-pecuniary compensation, judges have, in some cases, withheld access to redress, based on an assessment of the role of the victim as a mitigating factor during sentencing.<sup>456</sup>

Non-pecuniary compensation was withheld entirely or reduced in cases where the civil party/victim was deemed to have created the situation by knowingly working and residing illegally in Belgium:<sup>457</sup>

- *The precarious situation in which they found themselves and which was exploited by some defendants is the result of a **situation created by the civil parties themselves: they knowingly left Brazil to come to work in Europe in conditions that they must have known to be painful** [emphasis added].*<sup>458</sup>
- *The complainant must therefore have known about the conditions that she would need to endure to survive in Belgium ... .. there is, on her part **a tacit but aware acceptance of the risk she would run of finding herself in such a situation** [emphasis added].*<sup>459</sup>

<sup>454</sup> Hope for Justice, *Traffickers forced to compensate their victims*, 7 April 2017,

<sup>455</sup> In BE1: 4.732,96 euros and 8331,68 euros calculated respectively as back pay for two civil parties, court awarded as compensation. In BE2: 1.000,00 EUR as compensation for non-payment of wages. GRETA notes in Myria annual reports an increase in compensation awards to victims of trafficking during criminal proceedings. GRETA (2017), supra n.2, p.34.

<sup>456</sup> The same situation did not arise in the UK file study as the victims were UK/EU nationals or TCNs regularly residing in UK – However, “an asylum seeker working in breach of his conditions was unable to bring a discrimination claim against an employer because the employment contract was obtained by fraud. “The illegal conduct was... entirely that of the Applicant and it was the employer who was the innocent participant in what was in fact an illegal contract.” V v. Addey & Stanhope School & Others, Court of Appeal - United Kingdom Employment Appeal Tribunal, November 25, 2003, [2003] UKEAT 0565\_03\_2511, para 11. Cited in Anderson & Rogaly (2005), supra n.21, p. 51.

<sup>457</sup> BE29, BE31, BE39.

<sup>458</sup> Myria (2015), supra n.71, p. 116, Civil parties claimed 7500 and 10,000 euros non-pecuniary damage respectively but reduced to 1 euro by court. BE29 Unofficial translation, original text: “*La situation précaire dans laquelle ils se trouvaient et qui a été exploitée par certains prévenus est issue d’une situation créée par les parties civiles elles-mêmes: celles-ci ont quitté le Brésil en connaissance de cause pour venir travailler en Europe dans des conditions qu’elles devaient savoir être pénibles.*”

<sup>459</sup> BE31 Unofficial translation, original text: “*La partie civile devait donc se douter des conditions dans lesquelles elle allait être amenée à survivre en Belgique.....il y a, dans son chef une acceptation tacite mais consciente du risque qu’elle courrait d’attirer dans une telle situation.*”

In further cases, the court ruled inadmissible access to pecuniary damage for back pay of wages. In these cases, the principle reason for enforcing such a mitigating factor was the need to secure the public interest, with the illegal employment deemed to be the pursuit of an illegitimate interest. As a result, compensation was initially denied as the wages from illegal employment were identified as an unlawful advantage.<sup>460</sup> In the case of pecuniary damage, the courts position does appear to be divided as there are cases where, regardless of the illegal administrative status of the victim, the court awarded back pay of wages.<sup>461</sup> Ultimately, the current position has been clarified by the Court of Appeal of Liège in 2016, who ruled that the fact of knowingly working illegally and contribution to creation of situation of precarity is not relevant to the determination of remedy: ‘the Court thus emphasises that it is irrelevant that the workers were recruited by the defendants after they arrived in Belgium of their own free will’<sup>462</sup> reinforcing the irrelevance of consent.

### 3. Concluding remarks

The present chapter has added one more factor for consideration when conceptualising exploitation in law. In practice, its application will be twofold, in determining the existence of exploitation and then secondly how severe it is. The law in practice shows that indicators are used as a tool to assist the assessment of the judge, which as discussed is very much a subjective assessment. When it comes to qualifying the nature of exploitation it is clear that a number of indicators cumulatively are required, with the evidentiary importance of the non-payment of wages being a clear indicator of exploitative working practices. Of importance here, it has become clear that labour exploitation does not only refer to working conditions, but also other factors such as living conditions, wherein such conditions are “contrary to human dignity” (Belgium) and working conditions are not exploitative per se (England & Wales). Similarly, when it comes to the imposition of a penalty, the sentencing is determined by a number of different factors that can either aggravate or mitigate the final sentence imposed. Here we have identified two specific aspects that are of relevance to any conceptualisation

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<sup>460</sup> BE6, BE12, BE24.

<sup>461</sup> BE1, BE2, BE7, BE8, BE16, BE22, BE27, BE30, BE32, BE33, BE36, BE42, BE47.

<sup>462</sup> Myria (2017), supra n.6, p. 121. BE42 - Unofficial translation, original text : “la Cour souligne ainsi qu’il est indifférent que les travailleurs aient été recrutés par les prévenus après qu’ils aient rejoint la Belgique de leur propre gré. ”



of exploitation, the benefit received by the exploiter as an aggravating factor (Section 2.3) and the agency of the individuals as a mitigating factor (Section 2.4).

Finally, as mentioned in the introduction, qualification of exploitation is not only done by judges, but also by other actors at earlier stages in the investigative process. Therefore, in recognition of the subjective assessment that these actors will make and the possibility that it could be later rejected in court, we believe that a conceptualisation of exploitation in law will ensure that these indicators are applied in a more consistent manner, enhancing the effectiveness of the criminal justice system for victims of exploitation.



## **PART IV – Towards a legal conceptualisation of labour exploitation**



## **CHAPTER 11 – A proposal for a conceptualisation of labour exploitation in criminal law**

### **0. Introduction and structure of the Chapter**

The concept of labour exploitation has been extensively discussed in literature and in this work. Taking stock of the theoretical discussions on the components of this concept in law and political theory, as well as of its transposition in national legal orders, the time has come to propose an original contribution to these ongoing discussions.

In this chapter we take into account the findings of the thesis and propose a conceptualisation of labour exploitation in criminal law. Building upon and refining the analysis of the theoretical conditions (Chapter 6) and the domestic application of human trafficking and standalone offences (Chapters 9 & 10), we extract and present the key components of a conceptualisation of labour exploitation.

The primary purpose of the conceptualisation of labour exploitation is to provide a roadmap for the legal application of the concept in criminal law. The clarity engendered by such a conceptualisation goes towards setting the parameters of the material scope of human trafficking for the purposes of labour exploitation (see Section 2, Chapter 1 for discussion on impact of lack of definition of exploitation). Moreover, by focusing upon a legal formulation of the concept, it is possible to conceive of its applicability beyond the scope of the human trafficking offence, as a standalone

criminal offence. In this regard, the legal conceptualisation not only provides clarity to the scope of labour exploitation within the paradigm of human trafficking, but also has additional functions relating to situations of labour exploitation that i) do not qualify as human trafficking due to a lack of constituent elements of the offence and/or ii) do not meet the definition of the forced or compulsory labour. Furthermore, it is also applicable to domestic jurisdictions where the standalone offences are not yet criminalised in national legal orders.

Section 1 outlines the conceptualisation of the nature of labour exploitation in criminal law thus providing an answer to the final subsidiary research question: *How can labour exploitation be conceptualised in criminal law?* Section 2 reflects upon the application of the legal concept of labour exploitation in law offering further insights to ensure that its application is as effective as possible.

## **1. The proposed conceptualisation of labour exploitation in criminal law**

The legal conceptualisation of labour exploitation in this Section adheres to the three stages of exploitation (background, procedural and substantive) that emerged from the theoretical understanding in Chapter 6. The legal conditions of exploitation presented here represent an enhanced articulation of the conditions of exploitation that have been discussed in both theoretical and legal terms in previous chapters (see Chapters 4, 6 & 9).

The proposed conceptualisation is robust in the sense that its conception is the result of theoretical and legal analysis. In particular, despite the misgivings and legal lacunas identified by academic scholarship, the findings reveal coherence in that the same concepts keep resurfacing, including, *inter alia*, vulnerability, exercise of control and consent. As a consequence, these and other conditions are incorporated into the proposed legal conceptualisation. As with our previous discussion of the conditions of exploitation, individually, they do not amount to labour exploitation, it is their cumulative existence that leads to labour exploitation.

We propose that labour exploitation can be legally conceptualised as:

***A knowingly taking unfair advantage of B's position of vulnerability by means of the exercise of control showing a lack of respect for B's human dignity, in order to gain a benefit.***

*B's position of vulnerability creates an imbalance of bargaining power between A & B.*

*B's position of vulnerability can derive from structural and/or personal vulnerabilities.*

*B's ex ante position of vulnerability leaves them with a lack of real and acceptable alternatives*

*B's ex post position of vulnerability, which can be created by a dependency on A, makes it difficult for B to change their circumstances due to a lack of real and acceptable alternatives*

*Taking unfair advantage requires:*

- i) knowledge of B's position of vulnerability; and*
- ii) knowing abuse of the vulnerability*

*Unfair advantage is taken for the purpose of accruing a benefit*

*It is immaterial whether the perceived benefit is received by B or is mutually advantageous for A. The benefit can be material or immaterial in kind.*

*Exercise of control includes exercise of control or authority over a person's capacity or resources, that can foster a position of dependency.*

*Lack of respect for human dignity includes violation of human and labour rights, degrading and inhuman treatment and failure to secure a decent minimum wellbeing.*

*The consent of B at any time is irrelevant.*

*In determining whether B is being exploited, regard must be had to all the circumstances.*

The conceptualisation is an articulation of exploitation that is not overly broad and ensures that the elements are easily ascertained. By building on the extensive theoretical and practical analysis and employing standardised language this conceptualisation goes well beyond the context of Belgium and England & Wales and can be applied to a broader legal context both in other domestic jurisdictions but also

at an international level. The conceptualisation of exploitation will be further explained in the remainder of this Section, by reference to the conditions of exploitation.

## 2. Background conditions

The first stage of exploitation looks at the *background conditions* that can contribute to an increased risk of labour exploitation. Namely, **a structural and/or personal position of vulnerability** (Section 1.1) **that leads to an imbalance of bargaining power** (Section 1.2). Finally, we will discuss the **impact of the background conditions on the *ex ante* consent of the individual** (Section 1.3).

### 2.1. Structural and/or personal position of vulnerability

The *ex ante* position of vulnerability of the parties involved will be the focus of this section. Throughout the research a large number of different types of vulnerability have been identified in literature and in practice.<sup>1</sup> Such a position of vulnerability can result from both personal and structural injustices: including social, legal, economic, political and geographical factors.<sup>2</sup> The existence of such injustices does not create exploitation *per se*,<sup>3</sup> rather they exacerbate the precariousness or vulnerability of the individual and ultimately, increase the risk of an individual being exploited. Thus, we must note that exploitation is not inevitable.

The recognition of structural vulnerability, in particular, reinforces an understanding of labour exploitation based on the attributes of legal orders - domestic or otherwise - that shape power relations in labour markets as exemplified by the discussion of the *Rantsev* case and the Cypriot Artiste Regime in Chapter 1 (Section 3).<sup>4</sup> Similarly, recognition of the possibility of the State's contribution to structural

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<sup>1</sup> See Human Dignity Model and protection of vulnerable in Section 1.2, Chapter 5, abuse of position of vulnerability in file study in Section 2, Chapter 9, and vulnerability of individual as a sentencing factor in UK and aggravating factor in Belgium in Section 2, Chapter 10.

<sup>2</sup> For discussion of injustice at the structural level and whether or not it is necessary or sufficient requirement for exploitative transactions. is it sufficient. Zwolinski, M., 'Structural Exploitation', (2011) *Social Philosophy and Policy* 29(1), 154-179, p171; Stoyanova, V., *Human trafficking and slavery reconsidered conceptual limits and states' positive obligations in European Law*, (Cambridge: Cambridge University Press, 2017), p. 289.

<sup>3</sup> Again for reiteration that not all injustices lead to exploitation, oppression and coercion can occur but not result in exploitation Zwolinski (2011), *supra* n.2, p172 & p. 178.

<sup>4</sup> For discussion on over emphasis on interpersonal or relation exploitation in literature rather than structural exploitation and the responsibility of states see Zwolinski (2011), *supra* n.2, p176; Mantouvalou V., 'Legal construction of structures of exploitation' in Collins, H., Lester, G., & Mantouvalou V., (eds) *Philosophical Foundations of Labour Law*, (Oxford University Press, 2018); Wolff, J., 'Structures of exploitation' in Collins, H., Lester, G., & Mantouvalou V., (eds) *Philosophical Foundations of Labour*



injustices will, as Radeva Berket stated, ensure consideration of ‘the different ways in which persons can find themselves in a vulnerable situation [...] and more directly reflect reality.’<sup>5</sup> In particular, such an approach will minimise the extent to which responses to human trafficking are premised upon particular attributes that exacerbate exploitation, such as gender, migration status and type of exploitation as discussed in Chapter 1 (Section 2.2).

One small aside is needed to reiterate that any conceptualisation of labour exploitation that takes into account structural injustices must not overreach to the extent that issues of social justice are subsumed by the human trafficking/modern slavery discourse and should not let efforts to improve the policy areas that are also aimed at tackling social injustices fall by the wayside. In particular, certain structural vulnerabilities that are prominent in the file study analysis, such as homelessness and destitution, bring into question the effectiveness of other areas of domestic law and policy-making, such as the welfare State and the impact of a restrictive immigration policy.<sup>6</sup> The research has illustrated that structural aspects perpetuate not only vulnerability to exploitation but also exacerbate their duration. The file study in Part III exemplified this position in cases where the provision of accommodation by the exploiters reinforces their exercise of control over the victim’s circumstances. This feature of exploitation has been exacerbated by State policies such as the right to rent scheme introduced in England in 2016.<sup>7</sup> The scheme placed a duty on all landlords to check the immigration status of any potential tenants. The High Court has recently ruled that the policy is unlawful as it is incompatible with right to private life and non-discrimination.<sup>8</sup> However, in the context of this thesis, we suggest that it is exactly this type of immigration policy that exacerbates the dependency of victims of labour exploitation on their exploiters for the provision of accommodation as elaborated upon in Chapter 9 (Section 4).

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Law, (Oxford University Press, 2018); Muskat-Gorska, Z., ‘Can labour make an effective contribution to legal strategies against human trafficking?’, in Piotrowicz, R., Rijken, C., and Uhl, B. H., (eds) *Routledge Handbook of Human Trafficking*, (Routledge, 2017), p.460.

<sup>5</sup> Radeva Berket, M., *Labour exploitation and trafficking for labour exploitation—trends and challenges for policy-making*, ERA Forum (2015) 16, 359–377, p. 365.

<sup>6</sup> O’Connell Davidson, J., *Why MARRONAGE, not Slavery? The Case of UK Hand Car Washes*, 28 November, 2018.

<sup>7</sup> Section 22, Immigration Act 2014 (c.22); Home Office, Press Release: *Right to rent checks introduced for landlords in England*, 6 October 2015, available at: <https://www.gov.uk/government/news/right-to-rent-checks-introduced-for-landlords-in-england>

<sup>8</sup> *R (Joint Council for the Welfare of Immigrants) Claimant - and - Secretary of State for the Home Department* [2019] EWHC 452 (Admin).

The position of vulnerability must be assessed with regards to *all of the circumstances* including pre-existing vulnerabilities and vulnerabilities created due to force of circumstances during exploitation, as we saw in Chapter 9 (Section 4). The jurisprudential examination of a position of vulnerability reveals an evolution in how this concept is handled with a shift away from the dominant approach to human trafficking that considers position of vulnerability *ex ante* and the trajectory to be trafficked rather than exploited, instead the focus is now also placed upon the exploitative situation of the individual. Thus, any conceptualisation of the nature of exploitation should take into account not only the root causes or background conditions elements that are known to increase vulnerability to labour exploitation but also the *ex post* position of vulnerability that may be created by force of circumstances during the exploitation.<sup>9</sup> As we discussed in Chapter 9, the theoretical position places an emphasis on *ex ante* position of inequality whereas the understanding of the courts places an emphasis on the *ex ante* position of vulnerability. Regardless of how the background position of the individual is characterised, the common factor is that both *may* lead to an imbalance of bargaining power. Before turning to further explanation of this condition, it is reasserted that - just as with a position of vulnerability - a position of inequality due to an imbalance of bargaining power also does not automatically render a particular relationship exploitative, as will be further discussed in the next section.

## 2.2. Imbalance of bargaining power

As we saw in Chapter 5 (Section 2), the theoretical models of exploitation very firmly focused upon the economic value of labour placing a significant emphasis on labour relations and the market place as the locus of exploitative relationships and transactions. However, in practice the courts recognised that labour exploitation can also arise in the private sphere within interpersonal relationships.<sup>10</sup> In the context of employment relationships, wherein an imbalance of bargaining power is an inherent feature, labour law seeks to uphold the international value that ‘labour is not a commodity’<sup>11</sup> by

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<sup>9</sup> Muskat-Gorska (2017), *supra* n.4, p.460.

<sup>10</sup> See Home office typology where the relationship between the offender and the victim is the basis for the typology of modern slavery offences: Labour exploitation = employment relationship: Victims exploited for multiple purposes in isolated environments; Victims work for offenders; Victims work for someone other than offenders. Domestic servitude = personal relationship: Exploited by partner ; Exploited by relatives; Exploiters not related to victims Home Office, *A Typology of Modern Slavery Offences in the UK Research Report 93*, Christine Cooper, Olivia Hesketh, Nicola Ellis, Adam Fair (October 2017).

<sup>11</sup> Muskat-Gorska (2017), *supra* n.4, p.460.

imposing protection of workers' rights and protection of collective bargaining between the parties to the labour contract. This principle is enshrined by a number of legal doctrines including the doctrine of unconscionability, doctrine of *justium pretium* (just price theory) and defence of duress that seek to minimise the inequality by providing tools for ensuring, where possible, a level playing field. The research reveals that the commodification of the exploited party's labour power is also a feature of exploitation that occurs in a non-market context, e.g. in an interpersonal or familial relationship, as a result of an imbalance of bargaining power. Therefore, in the absence of the legal protections offered by the labour law regime, it is important for other fields, such as criminal law, to recognise the possibility of exploitation of labour in the private sphere.

The commodified individual, in both market and non-market relations, is taken advantage of in return for benefits - monetary or otherwise. Thus, regardless of the context, where an individual with very limited bargaining power exchanges their labour power, then labour commodification and exploitation coincide.<sup>12</sup> It is important to note that whilst unequal bargaining power may be the hallmark of commodification,<sup>13</sup> it is not an absolute condition: 'unequal bargaining power consists in the greater ability of one party to walk away from a deal, yet the inability to walk away from the deal does not, in itself, imply any illegitimacy.'<sup>14</sup> This point is the principal focus of the next section which discusses the impact of the balance of bargaining power on the *ex ante* consent of the individual in the context of exploitation.

### **2.3. Impact of imbalance of bargaining power on ex ante consent of individual**

Ultimately, for an imbalance of bargaining power derived from a position of structural and/or personal vulnerability to be considered as more than mere commodification, it must impact upon the decision-making capacity of the individual by fostering *ex ante* a lack of alternative options or a least bad position. As asserted in the legal and theoretical analysis in Parts I and II (Section 1, Chapter 4 & Section 2.2, Chapter 6) and the comparative legal analysis in Part III (Section 6, Chapter 9) of labour exploitation, the consent of the individual is an ever-present condition which is ultimately irrelevant.

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<sup>12</sup> For discussion on commodification and to what extent it coincides with exploitation see Hill, J., 'Exploitation', (1994) *Cornell Law Review* 79, 631, p. 633.

<sup>13</sup> Sample, R., *Exploitation: What it is and why it's wrong*, (New York: Rowman and Littlefield Publishers, 2003), p. 14.

<sup>14</sup> Sample (2003), *supra* n.13, p. 14.

In light of this, the role of consent in the legal conceptualisation of labour exploitation is once again paradoxical. On one hand, it is irrelevant i.e. is it possible to consent to a situation but for it still to amount to exploitation? On the other hand, the state of mind of the individual is attributed to the assessment of labour exploitation. We saw in Chapter 6 that it is important not to adopt an overly paternalistic approach that conflicts with the autonomy of the individual (Section 4). Still, the consent of the individual is nevertheless of crucial importance to the conceptualisation of labour exploitation, in determining the circumstances in which a position of labour exploitation is created (*ex ante* – considered here) and then maintained (*ex post* – discussed below).

Admittedly, it is unlikely that persons willingly and gladly enter exploitative working conditions.<sup>15</sup> Yet, it is important to recall that exploitation is a continuum. A recurring theme is that the initial demonstration of consent may have been expressed with regard to an offer of decent work, or indeed a lesser form of exploitation in circumstances whereby there was no other viable choice in the face of a lack of *ex ante* ‘socially and economically attractive options.’<sup>16</sup> With this in mind, where there is evidence of acceptance of an initial offer - even if based on defective terms and conditions - then there must be an objective comparison between the status quo *ex ante* and the opportunity for material gain that the offer promises (see Section 1.2 of Chapter 5).<sup>17</sup>

Unfortunately, in the context of labour exploitation, opportunities are often misrepresented and the reality of the working and living conditions are not as envisaged. Coupled with a lack of awareness of workers’ rights, individuals very often endure such situations as, again, they lack a reasonable alternative.<sup>18</sup> The means by which such a situation of exploitation is maintained is the focus of the next section which considers the procedural conditions that ultimately leads to a distinction between an individual’s poor decision making and those who have been compelled into making a choice that leads to exploitation.

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<sup>15</sup> Roemer, J., ‘Should Marxists be Interested in Exploitation?’, (Winter, 1985) *Philosophy & Public Affairs* 14(1), 30-65, p. 46.

<sup>16</sup> See discussion of lack of alternatives, limited choice, inability to change circumstances in Section 2.1 Chapter 1; Section 3.2, Chapter 2; Section 2.2, Chapter 3; Section 4, Chapter 4; Section 4, Chapter 6; Section 4, Chapter 9.

<sup>17</sup> Zwolinski (2011), *supra* n.2, pp.154-179.

<sup>18</sup> Consider Chowdury judgment and the attitude of the authorities that the workers could have just gone and looked for a employment elsewhere in Greece. *Chowdury & Others v Greece* [2017] Application No. 21884/15, para. 28 & para.100.

### 3. Procedural Conditions

The theoretical analysis reveals that labour exploitation occurs where the imbalance of bargaining power derived from a position of vulnerability is used as a tool of coercion or control by an exploiter in order to obtain compliance and achieve a benefit (Section 1, Chapter 6).<sup>19</sup> The imbalance of bargaining power is a key factor. Crucially, it is ‘the combination of the abuse of that power and the position of vulnerability of an individual that leads to a situation of exploitation.’<sup>20</sup> We articulate this in our legal conceptualisation as **the action of taking unfair advantage with a view to gaining a benefit, by means of the exercise of control**. As with the background conditions, the procedural stage emphasises the **impact of such exertion of control on the *ex post* consent of the individual**.

#### 3.1. Taking unfair advantage to gain a benefit

The actions and intentions of the stronger party in an unequal exploitative exchange can be attributed to the act of ‘*Taking unfair advantage .... in order to gain a benefit.*’ The fulfilment of this condition requires a number of actions on the part of the stronger party, including *inter alia*, i) the knowledge of the position of vulnerability; ii) the decision to take unfair advantage of the position of vulnerability and; iii) the intention to accrue a benefit from the situation.

First of all, the theoretical conditions of exploitation illustrate that the recognition of an imbalance of bargaining power and the inequality derived therefrom is not sufficient for labour exploitation, there needs to be more (Section 1, Chapter 6). Moreover, both the theoretical and jurisprudential analysis affirms that labour exploitation only arises where the exploiter uses the person’s vulnerability for an advantage in order to gain a benefit (Section 1, Chapter 6 & Section 2, Chapter 9).<sup>21</sup> It

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<sup>19</sup> For discussion on background injustices, especially those of a structural or institutional sort, leading to the establishment of inequalities between persons that can facilitate the exploitation of some by others see Zwolinski (2011), *supra* n.2, p159. Supported by Sample (2003), *supra* n.13. Ollus, N., & Jokinen, A., ‘Exploitation of migrant workers and trafficking in human beings: a nexus of the demand by employers, workers and consumers’, in Piotrowicz, R., Rijken, C., and Uhl, B. H., (eds) *Routledge Handbook of Human Trafficking*, (Routledge, 2017), p.479.

<sup>20</sup> Skrivankova, K., ‘Defining exploitation in the context of trafficking – what is a crime and what is not,’ in Piotrowicz, R., Rijken, C., and Uhl, B. H., (eds) *Routledge Handbook of Human Trafficking*, (Routledge, 2017), p.109.

<sup>21</sup> For discussion on the use of vulnerability as abuse of vulnerability in Dutch case law see Esser, L.B., & Dettmeijer-Vermeulen, C.E., ‘The Prominent Role of National Judges in Interpreting the International Definition of Human Trafficking’ (2016) *Anti-trafficking Review*, Issue 6, 91-105, p. 100.

must be noted that it is not for the exploited party to necessarily have created the position of *ex ante* vulnerability, '[exploitation] is the act of seizing that opportunity, not the act of seeking it, creating it, or discovering it.'<sup>22</sup> The act of taking unfair advantage (as articulated in theory) or abusing the position of vulnerability (as articulated in law) can be identified where there has been a violation of principles of distributive justice, a failure to respect the persons or a deviation from the market norm.

Secondly, the theoretical understanding of exploitation reveals that the act of taking unfair advantage does not require intent or awareness (Section 2, Chapter 5). However, legally, the formal criminalisation of the forms of labour exploitation discussed are crimes of intent, whereby the *mens rea* is either one of *dolus specialis* or *dolus eventualis* (Part I).<sup>23</sup> Therefore, it is contended that a legal conceptualisation of labour exploitation must require that the act of taking unfair advantage to be done intentionally or recklessly, as demonstrated by the formal and substantive criminalisation of labour exploitation in national legal orders in Chapter 8. The file study provides examples of such intentional acts by way of the targeted recruitment of individuals due to their irregular migration status (BE) or destitution (UK).

The domestic implementation of both international and regional definitions of human trafficking demonstrates that the *mens rea* element of the domestic offence - as it is at the discretion of the State party - will vary according to its implementation in a domestic jurisdiction.<sup>24</sup> For example, the file study of England & Wales highlighted that for a situation to amount to human trafficking, it is necessary that the intention to exploit (the person intends, knows or ought to have known that person to be exploited) be continuously present when facilitating or arranging travel of another person.<sup>25</sup> Alternatively, in some domestic settings, instead of *dolus specialis*, a lower threshold of *mens rea* is required, namely *dolus eventualis* wherein the foresight of the exploitation is a mere likelihood or possibility and does not require a degree of intention.<sup>26</sup> The lower threshold of *mens rea* could further blur the distinction between

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<sup>22</sup> Goodin, R., 'Exploiting a situation and exploiting a person', Reeve, S., (ed.) *Modern Theories of exploitation* (Sage Publishing, 1987), p. 168.

<sup>23</sup> Article 5(1), *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime*, New York, 15 November 2000, UNTS, vol. 2237, p. 319, Doc. A/55/383; Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, Warsaw, 16.V.2005 (2005), para. 228; Stoyanova (2017), supra n.2, p. 45.

<sup>24</sup> Council of Europe (2005), supra n.24, para.228.

<sup>25</sup> Stoyanova (2017), supra n.2, p. 45; Section 2(4) Modern Slavery Act 2015 (c.30).

<sup>26</sup> See example of French law in Stoyanova (2017), supra n.2, p. 45.

human trafficking and human smuggling, where it could be argued that smugglers have foresight or awareness that those who are smuggled are at a greater risk of exploitation and as a result exploitation is a likelihood or possibility. This situation could be avoided, however, should the *dolus eventualis* be attributed solely to the exploiter, as opposed to intermediaries, since the *mens rea* ‘to exploit something, [...] is to do something beyond merely using it. [...] you have to fit it into a plan or project of yours involving your control over the thing you use.’<sup>27</sup>

The explanation of the role of the exploiter so far is very much premised upon relational exploitation and leaves a gap as to the standard for structural exploitation. As mentioned above, the theoretical models reveal that it is possible for labour exploitation to be unintentional.<sup>28</sup> Again, such a scenario is not possible when criminalising labour exploitation due to the need for the exploiter to intend, have knowledge or ought to have known of the purpose of exploitation. Whilst, unintentional labour exploitation is not yet prohibited in law, the increasing recognition of the possible role of multiple actors embedded in complex supply chains that are protected by the ‘corporate veil doctrine’ may well further the rationale for reckless exploitation to be criminalised as a separate offence.<sup>29</sup> Indeed, in the corporate setting, an increased focus is being placed on strict liability for exploitation which by its very nature reduces the emphasis on the *mens rea* element.<sup>30</sup> As a result, ‘one can take an unfair advantage without directly interacting with the disadvantaged’<sup>31</sup> in recognition of the theoretical understandings of exploitation on a macro level, i.e. between an individual and society as a whole.<sup>32</sup> It is contended that a two-tiered approach to labour exploitation in law could be applied so that legal and policy responses to labour exploitation may adequately address the responsibility of those actors who foster the conditions of exploitation. For instance, the increased focus on the responsibility of businesses to ensure that there is no

<sup>27</sup> Wood, A., ‘Unjust exploitation’, (2016) *The Southern Journal of Philosophy* 54, 92–108, p. 94.

<sup>28</sup> Sample (2003), *supra* n.13, p. 58.

<sup>29</sup> Sinclair, J., ‘Strategic Litigation as a Tool to Combat Modern Slavery’, (2018) *Journal of Modern Slavery* 4(2), p. 47.

<sup>30</sup> For example, *California Transparency in Supply Chains Act* 2010 (US); Section 54, *Modern Slavery Act* 2015 (UK); Article 25 *Quinquies* of Legislative Decree No. 231/2001, Administrative liability of the legal person for offences committed under Article 600 (Slavery and servitude) and 601 (Trafficking) of the Italian Criminal Code (Italy); Article 5 Criminal Code provides for the criminal liability of legal entities including for human trafficking offence (Belgium).

<sup>31</sup> Fleurbaey, M., ‘The facets of exploitation’, (2014) *Journal of Theoretical Politics* 26(4), 653–676, p. 655; see also Skillman G., ‘Ne hic saltaveris: the Marxian theory of exploitation after Roemer’, (1995) *Economics and Philosophy* 11, 309–331.

<sup>32</sup> Roemer (Winter, 1985), *supra* n.15, p. 31–32; Haynes, D. F., ‘Exploitation Nation: The Thin and Grey Legal Lines between Trafficked Persons and Abused Migrant Laborers’, (2009) *Notre Dame Journal of Law, Ethics & Public Policy* 23(1), 1–70, p. 10–12; Cohen, G.A., ‘The Labor Theory of Value and the Concept of Exploitation’, (Summer, 1979) *Philosophy & Public Affairs* 8(4), 338–360; Hill (1994), *supra* n.12, p. 632.

evidence of exploitation in their supply chain could be further to hold States accountable for creating legal and policy structures of exploitation.<sup>33</sup>

Thirdly, the aim of taking unfair advantage must be to gain a benefit. However, it is important to note that such a benefit does not have to materialise. In exploitation theory Wertheimer writes that an exploiter may be considered to be “acting exploitatively” where A failed to gain from the transaction with B.<sup>34</sup> The definition of human trafficking also emphasises that whilst the purpose of labour exploitation must be identified, it is not necessary for the labour exploitation to have taken place. One reason for this is that human trafficking is deemed to be such a severe violation of human rights, due to the process (coercion/deception in transport/recruitment) that human trafficking (even without actual exploitation) should be prohibited.<sup>35</sup> Similarly, the legal conceptualisation of labour exploitation does not require the intended benefit to have been accrued, in recognition of the fact that the individual may nevertheless have experienced harm as a result of the means by which unfair advantage was taken of the position of vulnerability. (e.g. the coercion led to physical violence).<sup>36</sup> It is further asserted that such an understanding can extend beyond the context of human trafficking or indeed, to those interpretations of human trafficking where the means is not a constituent element. The act of taking unfair advantage in the legal conceptualisation of labour exploitation is discussed in the next section as the exercise of control over the person’s capacity or their resources.

### **3.2. Exercise of control over the person’s capacity or resources**

The exercise control or authority over the person’s capacity or their resources is the principal means by which an exploiter takes unfair advantage of the position of vulnerability.<sup>37</sup> We have seen throughout the thesis that the notion of control has been a key feature in both law and theory. The jurisprudential analysis in Part I revealed the

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<sup>33</sup> R203 - Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203), Recommendation on supplementary measures for the effective suppression of forced labour; Human Rights Watch, *Global treaty to protect forced labour victims adopted*, 11 June 2014; OSCE, *Ending exploitation, ensuring that businesses do not contribute to THB duties of states and private sector* (7<sup>th</sup> Occasional Paper, 2014).

<sup>34</sup> Wertheimer, A., *Exploitation*, (Princeton University Press, 1996), p. 209.

<sup>35</sup> Stoyanova (2017), *supra* n.2, p. 42-43.

<sup>36</sup> Goodin, R., *Protecting the vulnerable: a reanalysis of our social responsibilities*, (Chicago: University of Chicago Press, 1985), p. 194.

<sup>37</sup> Wood (2016), *supra* n.27, p. 94.



extent to which courts interpret the rights of ownership as the exercise of control as we discussed in relation to the ICTY in *Kunarac* in Chapter 2 and the Inter-American Court of Human Rights in *Brasil Verde* in Chapter 3. The prevalent academic understanding of control aligns with the property rights paradigm wherein possession is regarded as *sine qua non* slavery, as discussed in Chapter 2 (Section 3.3). The notion of control is also considered to be a crucial element to all the forms of exploitation enshrined in Article 4 of the ECHR.<sup>38</sup> Domestically, the Belgian human trafficking definition includes, as an action, the taking or transferring of control. Furthermore, the action of taking or transferring control has been interpreted by the Belgian judiciary as the exercise of authority [*lien de subordination*] as we discussed in Chapter 9 (Section 3). The comparative legal analysis provides examples of the *means* by which control is exercised over the person or their resources. Whilst, the means identified were very much similar to those that exist in the legal prohibitions of exploitation, they nevertheless all establish the exercise of control as the key outcome. However, it is important to note that, unlike the international and regional definitions of human trafficking, both domestic jurisdictions do not consider these means as a constituent element of the offence.

Notwithstanding, for the purpose of our proposed conceptualisation of labour exploitation in law, it is contended that the notion of control is a key ingredient and can be of use when determining the state of mind of the exploiter, particularly, in relation to the act of taking unfair advantage of the position of vulnerability of the exploited party. This understanding reflects the theoretical articulation of an exercise of power by some over others, to the disadvantage of the less powerful.<sup>39</sup> The link between the exercise of control in a theoretical Marxist sense and in relation to contemporary forms of exploitation is rooted in the control of the ‘process [...] and exercise [of] a general repressive control of the labour force to prevent rebellion.’<sup>40</sup> Application of this description to the context of labour exploitation can be interpreted as the fostering of dependency and creating a difficulty for the individual to change their circumstances as a result of a lack of alternatives, as discussed in the next section.

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<sup>38</sup> See for example the AIRE centre intervention in *C.N. and V. v. France*, 11 October 2012, Application No. 67724/09, para 67.

<sup>39</sup> Arneson, R.J., ‘What’s Wrong with Exploitation?’, (1981) *Ethics*, 91(2), 202-227, p.202.

<sup>40</sup> Crocker, L., ‘Marx’s Concept of Exploitation’ (Fall 1972) *Social Theory and Practice* 2, p. 206.

### 3.3. Impact of exercise of control on ex post consent of individual

The emergent understanding of control, both in law and theory, is twofold, referring not just to control over the person's capacity but also over their resources. In addition, a situation may deteriorate over time resulting in additional vulnerabilities that have been created by "force of circumstances," as regularly referred to by the judiciary in the case law analysis and impact on the *ex post* agency of the individual (see Chapter 9).

A recurring issue throughout the thesis, is the creation of dependency and a lack of real and acceptable alternatives that impacts on the ability of the individual to change their circumstances or status.<sup>41</sup> We have seen that both the European Court of Human Rights (Section 4, Chapter 2) and the British courts (Section 3.2, Chapter 8 & Section 4, Chapter 9) apply the ability to change circumstances in the context of servitude only. Here, with regards to servitude, the element of the offence is strictly interpreted as an "impossibility" to change circumstances, due to the 'the feeling that condition is permanent or unlikely to change.'<sup>42</sup> However, in practice the overall judicial interpretation of a situation of exploitation places significant emphasis on the exercise of control and the extent to which such feelings of inability to change circumstances are 'brought about or kept alive by those responsible for the situation.'<sup>43</sup> The analysis of international and domestic jurisprudence demonstrates that the inability to change their circumstances does not have to be due to a restriction of movement or deprivation of liberty due to some kind of imprisonment, it can also be derived from a climate of fear, economic compulsion or a lack of access to basic needs. The broader application of this condition illustrates that the contemporary legal understanding of labour exploitation includes those circumstances that are created by a disproportionate dependency upon the exploiter and is not solely reserved for the most egregious forms of exploitation such as slavery or servitude.

Finally, the individual's state-of-the-mind must be assessed on a case-by-case basis, on the basis that they have difficulty in changing their circumstances as

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<sup>41</sup> Supra n.16.

<sup>42</sup> *C.N. and V. v. France* (2012), supra n. 38, para 91, as discussed in relation to *Chowdury* in Chapter 3 (Section 5.2) and in the file study in Chapter 9 (Section 2, 4, 6).

<sup>43</sup> *C.N. and V. v. France* (2012), supra n. 38, para 91.

emphasised in the legal understanding of servitude (Chapter 2) and the discussion of the *Chowdury* case in Chapter 3 (Section 5.2). The focus on the individual's perception of the situation is important to avoid an overly paternalistic approach to the autonomy of individuals' decision-making as we highlighted in Chapter 6 (Section 4). The inability to change circumstances is also closely related to the outcome of the exploitation that will be discussed in the next section as the final stage of the conceptualisation of the nature of exploitation.

#### 4. Substantive Conditions

The substantive stage of exploitation assesses the cumulative effect of the conditions that are outlined in the background and procedural stages. The outcome of the exploitation can be identified as **the benefit**, that does not necessarily only refer to the exploiter but can also be **mutually advantageous** for the exploited party. Regardless of such benefit, it is contended that law must, above all, acknowledge the detrimental outcome of exploitation as a **lack of respect for human dignity**.

##### 4.1. Benefit and/or mutual advantage

As presented in the procedural conditions of exploitation, an exploiter takes unfair advantage of the position of vulnerability with a view to gaining a benefit, whether it be material or immaterial. The theoretical and legal analysis has demonstrated that realisation of the perceived benefit is not actually necessary for the situation to be conceptualised as exploitation. However, as we saw in Chapter 10 (Section 2.4), the excessive or disproportionate accrual of a benefit may well impact on the assessment of the severity of the labour exploitation.

Similarly, both the theoretical and legal analysis has shown that it is possible for a situation of labour exploitation to be mutually advantageous for the individual, but still, the receipt of a benefit does not preclude the identification of exploitation. In practice, such a scenario is illustrated by those cases where the exploited party may well have been remunerated to the extent that it was more than could be expected in

normal working conditions in their country of origin.<sup>44</sup> In this regard, as demonstrated by the case law analysis, the deduction of wages and the non-payment of the minimum wage are of significant evidentiary importance when assessing a situation of exploitation, as we have discussed in relation to how judges qualify exploitation in Chapter 10 (Section 1).

## **4.2. Lack of respect for human dignity**

Having regard to the preceding conditions, the ultimate deciding factor when it comes to determining whether or not a situation amounts to labour exploitation is to consider whether the situation demonstrates a lack of respect for human dignity. In normative terms, human dignity is broadly understood, in recognition of its existing use in law (Belgium for example) and its pivotal role to ensuring respect for human rights and labour rights.<sup>45</sup>

The comparative legal analysis highlighted the adherence to norms of human dignity as opposed to fairness. From the perspective of the Belgian case law, the focus was very much premised upon objective labour standards, as demonstrated by the inclusion of social criminal law offences on the indictment and the interpretation of conditions contrary to human dignity in the *travaux préparatoires*. Conversely, the emphasis in the England & Wales cases focused upon degrading and inhuman treatment a key component of the theoretical Human Dignity Model in Chapter 5 (Section 1.2). The degradation not only referred to inhuman physical treatment and abuse, e.g. shaving heads etc, but also to the deprivation of basic subsistence needs and the extreme dependency that ensued. It is, however, important to briefly reiterate that the stage in which the judiciary relied upon the condition of a lack of respect for human dignity does differ. In Belgium “living and working conditions contrary to human dignity” is a constituent element of the trafficking offence, whereas in England & Wales, the emphasis on the lack of respect for human dignity was predominantly utilised as part of the assessment of the severity of the situation when it comes to imposing sentencing

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<sup>44</sup> Article M3, 3.1, Service Public Fédéral Justice, *Circulaire du 23 décembre 2016 relative à la mise en œuvre d'une coopération multidisciplinaire concernant les victimes de la traite des êtres humains et/ou certaines formes aggravées de trafic des êtres humains* (23 décembre 2016).

<sup>45</sup> FRA research has also emphasised that respect for human dignity is at the core of EU fundamental rights protection, and is directly applicable to ensuring that workers' rights are respected, see FRA, 2019, p. 27.

factors, and as such was not considered as an ingredient of the offences due to the adherence to the regional interpretation of supranational definitions. However, we consider the lack of respect to be a key constituent element of any conceptualisation of the *nature* of exploitation.

## **5. Concluding remarks**

The goal of thesis was to present a legal understanding of labour exploitation that would be applicable to the human trafficking context. Here it is:

***A knowingly taking unfair advantage of B's position of vulnerability by means of the exercise of control showing a lack of respect for B's human dignity, in order to gain a benefit***

The legal conceptualisation of labour exploitation is considered robust enough to assist in the assessment of factual circumstances as to whether or not they amount to labour exploitation in the context of human trafficking. In particular, the conceptualisation of labour exploitation is hoped to assist where the factual circumstances do not adhere to the legal threshold of those forms of labour exploitation that are enumerated in the definitions. Above all, the conceptualisation of labour exploitation provides consistency and certainty, and will ensure that future situations of labour exploitation are recognised. Furthermore, the definition can also assist beyond the context of human trafficking and could well be considered as the legal threshold for future efforts at regulating exploitative working conditions e.g. in cases where forced labour, slavery and servitude are not criminalised as standalone offences.



## **CHAPTER 12 – Reflections for the application of the proposed legal conceptualisation**

### **0. Introduction and structure of the Chapter**

When discussing, in Chapter 4, the legal, political and moral obstacles to the legal clarification of labour exploitation we acknowledged that whilst there is a need to legally conceptualise exploitation, law alone is not the answer. In this chapter and in light of the findings of the file study (Chapters 9 & 10) and the proposed legal conceptualisation of labour exploitation (Chapter 11), we re-engage with this remark by presenting six reflections that must be considered when applying the legal concept of labour exploitation in practice (Sections 1-6):

- The first reflection asserts the distinction between the nature of labour exploitation and the degree of labour exploitation (Reflection 1). Whilst the former has been the object of enquiry in this thesis, we assert that the latter must also be taken into consideration.
- The second reflection revisits the discussion of the intended outcome of the human trafficking process: the exploitation. In this regard, we assert that trafficking is not equal to exploitation and as such must be given due attention when it comes to assessing the impact of the exploitation from the perspective of the exploited party, regardless of how they arrived in the situation (Reflection 2).
- The third reflection emphasises the need to recognise not only the centrality of exploitation but also the fluidity of the circumstances that in turn must be understood expansively to include not just working conditions but all of the circumstances of the exploited party (Reflection 3).

- The fourth reflection takes into account the hierarchical understanding of the existing forms of exploitation, whereby forced or compulsory labour is seen as the minimum threshold of exploitation in a labour context. We nevertheless assert that the threshold of labour exploitation should be premised upon an objective standard that constitutes a decent minimum of wellbeing (Reflection 4).
- The fifth reflection urges that efforts that seek to shift away from dominant responses to human trafficking, such as the focus on sexual exploitation through criminal justice mechanisms, must nevertheless be complemented by a labour approach (Reflection 5).
- The final reflection accounts for a difficult task when applying the proposed conceptualisation of labour exploitation: labour exploitation needs to be contextualised but cannot permit a *laissez faire* approach that engenders tolerance of exploitation (Reflection 6).

## **1. The distinction between the nature of labour exploitation and the degree of labour exploitation (Reflection 1)**

The first reflection asserts that the **nature** of labour exploitation is distinct from the degree of labour exploitation. First, it must be decided whether or not labour exploitation exists (nature) and then once this is done then it is possible to assess the severity of the situation (degree). The purpose of the thesis has been to conceptualise the *nature* of labour exploitation in law; however, it is impossible to entirely exclude discussion as to the *degree* of labour exploitation in law. In particular, an emerging issue from the comparative legal analysis in Part III was the determination of the degree (or severity) of exploitation as a key aspect of the judicial assessment. To this end, we have seen in Chapter 10 (Section 2) that in the domestic substantive criminalisation of labour exploitation the degree of exploitation is relevant to the sentencing phase.

Taking into account the role of the judiciary in operationalising the degree of exploitation through sentencing, it is important to note that such an assessment is to be applied on a case by case basis (Section 2.1, Chapter 10). Whilst the comparative legal analysis demonstrates that the sentencing guidelines are not yet fully developed,



indicators are available to assist the judiciary in determining the severity of the situation.<sup>46</sup> Where possible, the seriousness of the exploitation is objectively assessed according to the proportionality of the situation when compared with the terms of employment of legally employed workers.<sup>47</sup> However, in some instances, where it is not possible to use an objective benchmark, the impact on the victims will be difficult to discern and remains a task for the judge to apply his/her own reasoning and decision making. Of course, the latter is very likely to be subject to dispute.<sup>48</sup> As such, it is worth highlighting that a common ground for appeal in the file study of England & Wales was excessive penalty, however, in most cases, the appeal is dismissed.<sup>49</sup>

International and regional law has demonstrated that consent is irrelevant to the finding of the nature of exploitation, however in a domestic criminal judicial setting, the agency of the individual has been taken into account when assessing the severity of the situation as we discussed in Chapter 10 (Section 2.3).<sup>50</sup> In particular, the file study provides examples where the judicial determination of the degree of the exploitation paid heed to the action of the individuals themselves that could be said to have contributed to their exploitation as it further entrenched their precarity (a form of tolerance of exploitation).<sup>51</sup> To overcome any potential prejudices and regardless of the role of the individual, the law should ensure that the agency of the individual does not impact upon the assessment of the severity of the situation in the same way it does for the nature of exploitation.<sup>52</sup> It is also important to ensure that any assessment of the degree of exploitation does not impact on the finding of the existence of exploitation.<sup>53</sup>

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<sup>46</sup> The Delphi indicators categorise three different strengths for indicators, that are in turn applied to each of the elements of trafficking (act-means-purpose), see ILO, *Operational indicators of trafficking in human beings Results from a Delphi survey implemented by the ILO and the European Commission*, Geneva, 2009.

<sup>47</sup> See for example respect for the principle of equal treatment with workers in Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94, 28.3.2014, p. 375–390 and Section 233, Chapter 18 of the German Criminal Code, as discussed in Section 2 of Chapter 1.

<sup>48</sup> Skrivankova (2017), supra n. 20, p.114.

<sup>49</sup> UK1, UK3, UK12, UK16, UK19, UK24, UK25, UK28, UK30.

<sup>50</sup> In the UK, the Court of Appeal court adopted a strict approach to the consideration of the situation as forced labour, wherein the apparent consent of the individual to the working conditions meant that the forced labour issue did not require serious consideration. Consent to the situation, despite a death threat if he did not return to the cannabis factory see *R v N; R v LE* (2012) EWCA Crim 189, para 89-91, Para 91.

<sup>51</sup> Berntsen, L. E. *Agency of labour in a flexible pan-European labour market: A qualitative study of migrant practices and trade union strategies in the Netherlands*, Groningen: University of Groningen, SOM research school (2015).

<sup>52</sup> Vrijwilligheid en subjectief welbevinden bij so's spelen geen rol, Hof Arnhem – Leeuwarden 16 maart 2017, ECLI: GHARL 2017:2189; Council of Europe, *7th General Report on GRETA'S Activities* (2018), p. 7.

<sup>53</sup> On the development of indicators on a scale of gradation (strong, weak) as ways of identifying the existence of exploitation see Rittich, K., 'Representing, Counting, Valuing: Managing Definitional Uncertainty in the Law of Trafficking', in Kotiswaran, P., (ed.) *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, (Cambridge: Cambridge University Press, 2017), p.254. See reference made by Gallagher on the assessment of degree of harm during prosecutorial and investigative stages in Gallagher, A., 'The International Legal Definition of "Trafficking in Persons": Scope and Application' in Kotiswaran, P., (ed.) *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, (Cambridge: Cambridge University Press, 2017), p.96.

## 2. ‘Trafficking does not equate to exploitation’: <sup>54</sup> emphasising the actual exploitation rather than the means (Reflection 2)

We have seen throughout the thesis that the offence of human trafficking becomes privileged over other standalone forms of labour exploitation (Chapters 1, 4, & 9). Exploitation is considered as a key element of the trafficking definition, however, since the Palermo Protocol does not include an obligation to do anything about exploitation, standalone forms of labour exploitation are potentially excluded, where the circumstances do not meet the requirement of the action and means constituent elements of the human trafficking offence as discussed in Chapter 1 and Chapter 4. The emphasis remains on the acts and means that lead or facilitate the exploitation whether it occurs or not.<sup>55</sup> As such, the “actual exploitation” is intrinsically linked to the process of human trafficking but is ultimately the end result.<sup>56</sup>

There are many paths by which a person arrives in a situation of exploitation.<sup>57</sup> Furthermore, the actual exploitation may arise in multiple situations both in domestic situations where there is no cross-border movement, or where there is a migratory journey, exploitation may not only occur at the destination but also in and around smuggling hubs and departure areas or during transit.<sup>58</sup> Therefore, it is important that responses are designed to react to the “actual exploitation”, especially as it is not only

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<sup>54</sup> Wijers, M., ‘Purity, Victimhood and Agency: Fifteen years of the UN Trafficking Protocol, (2015) *Anti-Trafficking Review*, issue 4, 56-79.

<sup>55</sup> Anti-Slavery International, *Trafficking for forced labour in Europe: Report on a study in the UK, Ireland the Czech Republic and Portugal*, (November 2006), p. 8. See for example paradoxical situation in Romania in which some situations where exploitation did not take place are punished more severely than situations where exploitation did indeed take place in Rijken, C., (ed.) *Combating trafficking in human beings for labour exploitation* (Wolf Legal Publishers, 2011), p. iii, p. 398. The restricted nature of the human trafficking constituent elements is not only problematic with regards to the exploitation, but also with regards to the coercion that could also be present in non-trafficking related exploitative circumstances. Lasocik draws attention to this point with reference to the inclusion of abuse of position of vulnerability that only becomes part of a criminal activity when combined with another element of the human trafficking definition e.g. the action in Lasocik, Z., ‘Human Trafficking: a challenge for the European Union and its member states (with particular reference to Poland)’ in Holmes, L., (ed.) *Trafficking and human rights – European and Asia-Pacific Perspectives* (Edward Elgar, 2010), p. 23; For further discussion on the creation of vulnerabilities as either intrinsic or pre-existing vulnerabilities or indeed those that have been created by the exploiter or by structural systemic issues Gallagher, A., & McAdam, M., ‘Abuse of a position of vulnerability within the definition of trafficking in persons’, in Piotrowicz, R., Rijken, C., & Uhl, B. H., (eds) *Routledge Handbook of Human Trafficking*, (Routledge, 2017), p. 189.

<sup>56</sup> For discussion on trafficking as a process see Aronowitz, A., *Human Trafficking, Human Misery: The Global Trade in Human Beings*, (Plymouth: Scarecrow Press Inc., 2013), p. 1; Paavilainen, M., ‘Towards a Cohesive and Contextualised Response: When is it necessary to distinguish between forced labour, trafficking in persons and slavery?’, (2015) *Anti-Trafficking Review*, issue 5, 158–161, p. 158.

<sup>57</sup> Allain, J., & Bales, K., ‘*Slavery and its Definition*’, (2012) Queen's University Belfast Law Research Paper No. 12-06, p. 2; Rijken, C., ‘Trafficking in human beings for labour exploitation: cooperation in an integrated approach’, (2013) *European Journal of Crime, Criminal Law and Criminal Justice* 21, 9-35, p. 13. See also Kelly, L., ‘“You can find anything you want”: a critical reflection on research on trafficking’ (2005) *International Migration*, 43(1-2), 235-265, p. 256.

<sup>58</sup> UNODC, *Global Study on Smuggling of Migrants*, (2018), p. 38-42.

those in an irregular position who are at risk,<sup>59</sup> but also those regular workers in the formal economy who may nevertheless be ‘subject to extensive rights violations, including confinement, passport confiscation, non-payment of wages, and physical violence or its threat.’<sup>60</sup> With this in mind, any subsequent analysis of future interventions should, therefore, focus on the outcome, namely the exploitative working conditions, that may or may not amount to human trafficking, forced labour or slavery, but does amount to labour exploitation.<sup>61</sup>

Interestingly, the centrality of exploitation emerges in the analysis of the domestic cases of human trafficking, whereby in practice, the actual labour exploitation triggers investigations. The file study reveals that every case consisted of actual labour exploitation and the prosecution and judiciary relied upon these factual circumstances in order to determine the existence of the offence and to demonstrate how a situation of labour exploitation has been created and maintained.<sup>62</sup> In this regard we reiterate that only by recognising that trafficking does not equate to exploitation, can we make effective progress to its understanding. One way of achieving this could be the introduction of a general form of exploitation in law, which has in fact been unsuccessful as mentioned in relation to the UK in Chapter 8 (Section 2.4) due to concerns that a shift towards exploitation could dilute the high standards of human trafficking and slavery. However, recent calls for an additional legal instrument to clarify the meaning of labour exploitation could see more momentum in this regard at regional level.<sup>63</sup>

Alternatively, rather than tackling the law at its source, there could be a shift towards a more victim centered perspective whereby regardless of the legal distinction between human trafficking and exploitation, there is recognition of the similarity of the individuals experience, either as a victim or worker. Where the abuse endured

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<sup>59</sup> For discussion on legal distinction between smuggling and human trafficking, and those who willingly embark upon a journey in search of better job opportunities see Goodey, J., ‘Human Trafficking: Sketchy Data and policy responses’ (2008) *Criminology and Criminal Justice* 8, 421-442, p. 423.

<sup>60</sup> O’Connell Davidson, J., ‘New Slavery, Old Binaries: Human Trafficking and the Borders of ‘freedom,’” (2010) *Global Networks* 10(2), 244–61, p. 249.

<sup>61</sup> For more examples of proposal to focus on the situation of exploitation i.e. the forced labour element rather than the movement element see Anti-Slavery International (2006), *supra* n. 55, p. 7.

<sup>62</sup> Skrivankova (2017), *supra* n. 20, p.111.

<sup>63</sup> Council of Europe, *Ready for future challenges - Reinforcing the Council of Europe - Report by the Secretary General for the Ministerial Session in Helsinki*, 16-17 May 2019, CM-Public SG (2019) 1 01/04/2019, p.29.

constitutes criminal behaviour then,<sup>64</sup> as such ‘victims of both wrongs need to be extended the same rights, regardless of how their experience is defined in legal terms.’<sup>65</sup> This is particularly important when it comes to the identification of victims, and the type of support they receive according to the category of offence they fall into, as Wijers stresses, ‘there is no reason why one category of victims of forced labour and slavery-like practices should have access to assistance and protection and other categories not, simply because of the way they arrived in that situation.’<sup>66</sup> Thus regardless of their position in law, from the victim’s perspective, it is important to address the vulnerability that leads them to the exploitative situation, whether it is through economic migration or human trafficking.<sup>67</sup> Ultimately, the rights of all victims of exploitation should be the same, regardless of whether they are subject to trafficking, forced labour, slavery or slavery like practices.

There is one caveat to such a contention: a shift towards exploitation must be mindful of its application in the context of human trafficking.<sup>68</sup> Any approach advocating a shift towards focus on “exploitation” must not ‘dilute the high standards required for slavery and trafficking in international law nor undermine future prosecutions.’<sup>69</sup> A redirection must ensure that there is no watering down of the seriousness of the issue, ensuring that access to justice and redress for all victims is simply replaced with increased regulation.<sup>70</sup> For example, should measures seeks to label exploitative situations as ‘seriously oppressive employment relationships,’<sup>71</sup> must secure ‘vigorous application of [labour law regulations] to cases that fall outside of the realm of trafficking or slavery but where victims are deserving of redress for labour exploitation.’<sup>72</sup> In light of this very valid concern, it is therefore important to ensure

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<sup>64</sup> Rijken. C., ‘A human rights-based approach to trafficking in human beings’ (2009) *Security and human rights*, 3, 212-222, p. 213.

<sup>65</sup> legal provisions targeting victims of trafficking should be extended to benefit all victims of severe labour exploitation., European Union Agency for Fundamental Rights, *Severe labour exploitation: workers moving within or into the European Union States’ obligations and victims’ rights*, June 2015, p. 39.

<sup>66</sup> Wijers (2005), supra n.54. For example, under Article 8 of the Victim’s Directive, victims of criminalised forms exploitation have the right to access support services in accordance with their needs, regardless of having been trafficked or not, see FRA (2015), supra n. 70, p. 20

<sup>67</sup> Ollus, N., ‘Regulating forced labour and combating human trafficking: the relevance of historical definitions in a contemporary perspective’ (2015) *Crime Law and Social Change* 63(5), 221-246, p. 241.

<sup>68</sup> Allain, J., *Slavery in international law of human exploitation and trafficking*, (Leiden: Martinus Nijhoff Publishers, 2013), p.325-326.

<sup>69</sup> Vijayarasa, R., & Villarino J.M.B., ‘Modern-day slavery? A Judicial Catchall for Trafficking, Slavery and Labour Exploitation’ (2012) *Journal of International Law and International Relations* 8, 36-6, p. 41.

<sup>70</sup> Edwards, A., ‘Trafficking in human beings: At the intersection of criminal justice, human rights, asylum/migration and labor’, (2007-2008) *Denver Journal of International Law and Policy* 36, 9-53, p. 45.

<sup>71</sup> Borrowing from the minority reasoning of Honourable Justice Kirby in *The Queen v Tang* [2008] HCA 39, August 28, 2008 M5/2008, para 117.

<sup>72</sup> Vijayarasa & Villarino (2012), supra n.76, p. 41.

that any shift in how to handle labour exploitation adopts an integrated approach that permits flexibility whilst giving equal weight to all forms of exploitation. Despite the importance of highlighting the possibility of such detrimental effects, we contend that the shift towards exploitation strengthens the framework for all those who are exploited as it will apply even where the action and the means do not exist, but actual exploitation has taken place.

### **3. Labour exploitation as an all-encompassing, non-static phenomenon (Reflection 3)**

The third reflection emphasises the need to recognise not only the centrality of exploitation but also the fluidity of the circumstances that in turn must be understood expansively to include not just working conditions but all of the circumstances of the exploited party.<sup>73</sup>

We will first turn to the fluidity of the circumstances, by making use of the ‘continuum of exploitation’ - as coined by Skrivankova in 2010 – which consists of a spectrum of labour conditions ranging from decent work to severe labour exploitation, including slavery, servitude and forced or compulsory labour.<sup>74</sup> Not only does the continuum help with the conceptual difficulty of distinguishing between “strong exploitation” (those forms that are prohibited in law) and “weak exploitation” (namely, the precarious, exploitative and normatively reprehensible situations that do not meet the legal threshold of these legal recognised form)<sup>75</sup> but also in facilitating the shift towards an increased focus on the fluidity of exploitation in recognition of the fact that it is a non-static phenomenon. The latter recognises that an individual may well have initially consented to a particular set of circumstances, but either finds him/herself in an entirely different situation or indeed in a situation which has much deteriorated since

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<sup>73</sup> Skrivankova, K., ‘Defining exploitation in the context of trafficking – what is a crime and what is not,’ in Piotrowicz, R., Rijken, C., and Uhl, B. H., (eds) *Routledge Handbook of Human Trafficking*, (Routledge, 2017), p.115.

<sup>74</sup> Skrivankova, K., *Between decent work and forced labour: examining the continuum of exploitation*, JRF programme paper (November 2010), p. 19. For discussion on the utility of the continuum see Ollus (2015), supra n.72, p. 241; Andrees, B., & van der Linden, M., ‘Designing Trafficking Research from a Labour Market Perspective: The ILO Experience,’ (2005) *International Migration* 43(1/2), 66, p. 65; Anderson, B., *Motherhood, Apple Pie and Slavery: Reflections on Trafficking Debates*, Centre on Migration, Policy and Society, Working Paper No. 48, (University of Oxford, 2007), p. 11; Coghlan, D., & Wylie, G., ‘Defining Trafficking/Denying Justice? Forced Labour in Ireland and the Consequences of Trafficking Discourse’, (2011) *Journal of Ethnic and Migration Studies* 37(9), 1513-1526, p. 1518.

<sup>75</sup> For further discussion see Kotiswaran, P., ‘From sex panic to extreme exploitation: revisiting the law and governance of human trafficking’ in Kotiswaran, P., (ed.) *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, (Cambridge: Cambridge University Press, 2017), p.13.

the initial consent, as identified in the file study (Section 4, Chapter 9). Here, the continuum accounts for the possibility that decent working conditions may deteriorate into exploitative working conditions.<sup>76</sup> The theoretical understanding of exploitation also recognises that a very normal situation can lead to labour exploitation due to the inherent vulnerability or need of the disadvantaged party that may have been created as a result of the unfair conditions in the exchange, as discussed in relation to the Human Dignity Model and Basic Needs Model in Chapter 5. Ultimately, the continuum captures the complexity of the situations that can occur along the spectrum, as the file study reveals.<sup>77</sup> Therefore, an understanding that labour exploitation can result from a deviation from standard working conditions is useful to understanding the fluidity of the concept and for triggering a right to remedy.<sup>78</sup>

Secondly, as well as recognising the fluidity of the circumstances, it is also important to recognise the totality of the situation, thereby shifting away from a restrictive reading of exploitation that focuses solely upon labour conditions. Both the theoretical models of exploitation and the legal analysis of supranational and national legal orders confirm this and illustrate that exploitation is an all-encompassing phenomenon and is not restricted to working conditions. It is, therefore, necessary to go beyond the mere economics of the situation (Section 2, Chapter 5). The international and regional definitions of the standalone forms of servitude and slavery explicitly hint that the status or condition impacts on more than the working conditions (e.g. serf's obligation to live on premises and the exercise of powers tantamount to ownership leading to the reduction to an object), the analysis of both regional and domestic jurisprudence confirms that the assessment must consider all circumstances, including living conditions, access to medical care and provision of subsistence (Section 7, Chapter 9 & Section 1, Chapter 10). The assessment must also go beyond the immediate factual circumstances of the case and regardless of the source of the *ex ante* and *ex post* vulnerabilities (structural or personal) of the exploited party. For example, the undocumented migrant status of the applicants in *Chowdury* and civil parties in the Belgian cases and the destitution of the victims in British cases were all assessed by the courts as factors that exacerbated their position of vulnerability before, during and

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<sup>76</sup> Skrivankova (2010), *supra* n.80. p. 19.

<sup>77</sup> Skrivankova (2017), *supra* n. 81, p.112.

<sup>78</sup> FRA Definition cited in Skrivankova (2017), *supra* n. 81, p.113.

after the exploitation.<sup>79</sup> The situation in *Chowdury*, and indeed, in many of the cases analysed, demonstrates the importance of recognising the concept of labour exploitation as a process, whereby background, procedural and substantive conditions must be taken into account. This can be achieved where the circumstances of a situation of exploitation are assessed recognising both the fluidity of exploitation as a continuum and the totality of the situation.

#### **4. The threshold of labour exploitation as a decent minimum wellbeing that guarantees respect for human dignity (Reflection 4)**

The analysis of the existing legal definitions revealed an enumerative approach that presented the forms of labour exploitation as a hierarchy.<sup>80</sup> This approach was coined by the European Court and reinforced in England & Wales by Court of Appeal in *R v SK* and subsequent case law. However, the forms of exploitation in the Palermo Protocol ‘do not impart nor imply a hierarchy of severity; severity of exploitation and resulting harm is to be determined by an assessment of the factual circumstances of the specific case, not the type of exploitation.’<sup>81</sup> Similarly, the ICTY in *Kunarac* rejected the hierarchical conceptualisation of slavery, servitude and forced labour and advocated a shift towards a more comprehensive understanding of labour exploitation as a general umbrella concept. Thus, the question remains, what is the threshold of labour exploitation?

Following the theoretical exploration and the comparative analysis of two domestic legal frameworks, it is purported that the threshold of labour exploitation should be premised upon an objective standard that constitutes a decent minimum of wellbeing.<sup>82</sup> This benchmark draws heavily upon the Basic Needs Model whilst

<sup>79</sup> *Chowdury and others v. Greece*, 30 March 2017, Application no. 21884/15, para.95.

<sup>80</sup> In European Court, see *Siliadin* [2005], supra n.129, para.123- 124 citing *Van Droogenbroeck v Belgium*, Commission's report of July 9, 1980, Series B no. 44, p.30, paras 78-80. Courts acknowledged that the prohibited practices in Article 4 as ‘descending types of slavery’ and distinct concepts, see Keane (2013), supra n. 174, p. 183. In Australian High Court, in *R v Tang* confirmed that the ‘harsh and exploitative conditions do not themselves amount to slavery,’ the offence is distinguishable in law on the basis of whether a right of ownership is being exercised. It is also important to note that the Australian Criminal Code provides the possibility ‘to apply overlapping offences to the matter at hand’ see Tully (2010), supra n.138, p. 418. See Section 3.1, Chapter 2.

<sup>81</sup> UNODC, *Issue paper, The International Legal Definition of Trafficking in Persons: Consolidation of research findings and reflection on issues raised*, (Vienna: United Nations, 2018), p 32.

<sup>82</sup> See discussion of objective standard that emerged from “Chinese Restaurant Case” Supreme Court judgment in the Netherlands in Esser, L.B., & Dettmeijer-Vermeulen, C.E., ‘The Prominent Role of National Judges in Interpreting the International Definition of Human Trafficking’ (2016) *Anti-trafficking Review*, Issue 6, 91-105, p. 100; Rijken (2011), supra n.55, p.500.

ensuring that the human dignity of the individual is not violated as well as ensuring sufficient revenue to purchase the goods necessary to live a distinctly human life regardless of background e.g. migration status. Such an understanding already exists, to a certain extent, in the Belgian national legal order. The legal formulation of economic exploitation as “conditions contrary to human dignity” is interpreted as safeguarding a particular level of quality of life that guarantees respect for others and to guarantee a certain quality of life and to protecting human existence through the provision of basic needs, as the Belgian file study revealed in Chapter 10 (Section 1). Another example of such a standard is the development of a living wage, that is premised upon the need to ensure that subsistence needs are met to ensure a decent quality of living.<sup>83</sup> Indeed, labour law standards in general can be of assistance, as the rationale for different legal standards in this context seek to achieve an optimal level of labour protection.<sup>84</sup> In the context of labour exploitation, the threshold would seek an optimal level of decent minimum of wellbeing that guarantees respect for human dignity.

The application of an objective standard must consider the agency of the individual, which may manifest as: i) a waiver of any future labour abuse/exploitation as a result of initial consent to the misrepresented situation; ii) a negation of labour exploitation following the acceptance of standards that are similar to those of the country of origin; and iii) a perception of the individual as a willing party as a result of the use of subtle forms of coercion - as opposed to an individual who is compelled to work as a result of the use of force. However, in Chapter 6, the theoretical analysis reinforced the principle of irrelevance of consent as it may be the result of compulsion, a demeaning choice or the least worse option (Section 4). The legal analysis also adopted the same position as highlighted in Chapter 9, in recognition of the fact that the individual may have been manipulated, conditioned or had their will overborne, the consent of the workers to labour standards that are not in compliance with the legal and policy framework of that country is not taken into account (Section 6). A point of consensus throughout the research is that the objectives standards of the working

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<sup>83</sup> Wolff, J., ‘Structures of exploitation’ in Collins, H., Lester, G., & Mantouvalou V., (eds) *Philosophical Foundations of Labour Law*, (Oxford University Press, 2018), p.117.

<sup>84</sup> See ILO Decent Work Agenda.



conditions in that country are to be applied (Section 2.3, Chapter 1; Section 4, Chapter 6; Section 6, Chapter 9).<sup>85</sup>

Thus, an application of a sufficiency standard in law would comprise an objective measure of the basic minimum well-being, whereby the situation is assessed regardless of the consent of the individual to any of the conditions, ensuring a zero-tolerance approach to labour exploitation. Three limitations to the sufficiency standard must be addressed: first of all, it is important to ensure that any regulatory measure of sufficiency in a free market political economy does not reinforce a rationalisation of labour exploitation, whereby ‘employers, and sometimes even the legislators who draft support for such exploitation, will assert that the exploited person is better off than they would be without the job.’<sup>86</sup> Secondly, the autonomy of individuals must be respected and any imposition of an objective standard must not be too paternalistic. And finally, it may be very difficult to find a consensus on the enforcement of such a standard, as there will be a need to take into account the historical development of labour regulation and the disparity between different approaches in national contexts as we will discussed in the next section.<sup>87</sup>

These limitations are guarded against by premising the legal application of the sufficiency standard on the norm of dignity and by building on already existing understanding of “decent work.” The threshold of the objective decent minimum of wellbeing can be adapted from the “decent work” paradigm that considers non-decent work to encompass those employment relationships that lead to precariousness for the worker involved.<sup>88</sup> However, it must be noted that the current emphasis on non-decent work is very much premised upon market relations. Therefore, in order to be applicable in a non-market relation context, it is important that the objective decent minimum threshold captures the totality of the situation (including living conditions) as emerged from Chapter 9 (Section 7). The threshold of labour exploitation must be objectively determined according to a sufficiency standard measured in accordance with a decent minimum wellbeing that guarantees respect for human dignity, irrespective of consent.

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<sup>85</sup> Esser & Dettmeijer-Vermeulen, *supra* n.89.

<sup>86</sup> Haynes, D. F., ‘Exploitation Nation: The Thin and Grey Legal Lines between Trafficked Persons and Abused Migrant Laborers’, (2009) *Notre Dame Journal of Law, Ethics & Public Policy* 23(1), 1 -70, p. 24-25.

<sup>87</sup> Intervention by Samwer, J., ILO Conventions and labour standards, AHRI Conference paper, 2017 [on file with author], p.4.

<sup>88</sup> Barnard, C., ‘Non-standard employment: what can the EU do? in New forms of employment in Europe’, (2016) *Bulletin of comparative labour relations* 94, 55, p.58.

The operationalisation of this threshold may well encounter some initial teething problems when it comes to the assessment of conditions in an inter-personal relationship. As we have seen, the courts are reluctant to interfere in situations that are derived from cultural expectations or traditional norms such as *M & Others v Italy & Bulgaria* [2012] discussed in Chapter 1 (Section 3). Nevertheless, it is contested that the application of an objective norm premised on dignity will enable the courts to determine what is acceptable to society in accordance with ‘the prevailing norms in their temporal and geographical context’ as suggested by the Australian High Court in *Tang* discussed in Chapter 2 (Section 3.3).

## 5. A criminal justice approach must be complemented by a labour approach (Reflection 5)

We have seen in Chapter 4 that the neo-abolitionist movement has thus far resisted a shift away from dominant responses such as the focus on sexual exploitation through criminal justice mechanisms.<sup>89</sup> However, we believe that the legal clarification of labour exploitation must also be complemented by a labour approach.<sup>90</sup>

A labour perspective will overcome existing problems that emerge from a restrictive migration lens that currently prevents all individuals who are exploited from accessing redress regardless of their migration status.<sup>91</sup> A robust labour approach must account for the economic, social and cultural disparities that foster the vulnerability and

<sup>89</sup> See neo-abolitionist and marginalization of labour exploitation due to focus on sex exploitation and lack of consideration of ESCR e.g. economic disparities in Chuang, J., ‘Rescuing trafficking from ideological capture: prostitution reform and anti-trafficking law and policy,’ (2010) *University of Pennsylvania Law Review* 158(6), 1655-1728, p. 1683 & p. 1726. Muskat-Gorska, Z., ‘Can labour make an effective contribution to legal strategies against human trafficking?’, in Piotrowicz, R., Rijken, C., and Uhl, B. H., (eds) *Routledge Handbook of Human Trafficking*, (Routledge, 2017), p.460-461.

<sup>90</sup> Shamir, H., ‘A labor paradigm for human trafficking’, (2012) *UCLA Law Review* 60, 76 – 136, p. 91; Skrivankova (2010), *supra* n.80, p. 29-30; Muskat-Gorska (2017), *supra* n.96; Bravo, K., ‘Free labour! A labour liberalisation solution to modern trafficking human beings’ (2009) *Transnational Law and Contemporary Problems* 18, 545-615; Pope, J., ‘A free labor approach to human trafficking’, (2010) *University of Pennsylvania Law Review*, 158, pp. 1849- 1875.

<sup>91</sup> See provisions on Outstanding wages (Articles 6.1, 6.2 and 6.3) Complaint mechanisms (Article 13.1) and Residence permits (Article 13.4) in Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals but poorly implemented see PICUM Position Paper, Employers’ Sanctions: Impacts on Undocumented Migrant Workers’ Rights in Four EU Countries (April 2015); PICUM, Summary of findings in Belgium and the Czech Republic on the implementation of the Employers’ Sanctions Directive (2017).

On role of protectionist migration policies on susceptibility of workers to exploitation see discussion of the Employers Sanction Directive as being indicative of the acceptance of illegal employment and the increased risk of exploitation/human trafficking whilst only focusing on irregular third country nationals to the exclusion of EU citizens or nationals that may well be subjected to exploitative working conditions in Rijken, C., ‘Trafficking in human beings for labour exploitation: cooperation in an integrated approach’, (2013) *European Journal of Crime, Criminal Law and Criminal Justice* 21, 9-35.

lack of choice very often encountered by potential victims of labour exploitation.<sup>92</sup> For instance, Ollus & Jokinen stress that a labour approach would need to tackle issues such as the social construction of demand for cheap labour,<sup>93</sup> that Chuang describes as ‘the larger socio-economic forces that feed the “emigration push” and “immigration pull” toward risky labour migration practices in our globalised economy.’<sup>94</sup>

A labour approach already has a strong normative legal foundation, with Article 6 of the ICESCR stating that: ‘everyone has the right to the opportunity to gain a living by work he or she freely chooses or accepts’. Human rights law further reinforces the protection of all workers regardless of migration status in the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and more recently in Objective 6 of the Global Compact on Migration which seeks to facilitate fair and ethical recruitment and safeguard conditions that ensure decent work. A shift in focus onto the promotion and protection of rights, would no longer require the status of the individual to be labelled e.g. migrant, national/citizen, illegal, legal, smuggled, trafficked etc. Indeed, the 2018 UNODC Global study on smuggling of migrants emphasises the multiple identities that migrants can hold, either simultaneously or over time and the complexity that this entails in terms of legal protections and rights.<sup>95</sup> Furthermore, we must account for the fact that the migration status of an individual is not static and can fluctuate overtime and, in some instances, as Lewis et al contend, such changes can even increase the precarious position of workers.<sup>96</sup> Thus, bearing in mind the complexity of such circumstances, we concur with research findings that stress the need to guarantee all workers’ protection from exploitation by guaranteeing their basic labour rights regardless of migration status and securing their access to justice e.g. loss of earnings.<sup>97</sup>

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<sup>92</sup> On dominance of criminal justice responses etc to human trafficking and failure to take into account fundamental economic principles and forces and their effects on both licit and illicit traffic and trade. Bravo (2009), supra n.85, p. 559.

<sup>93</sup> Ollus, N., & Jokinen, A., *Trafficking for Forced Labour and Labour Exploitation – Setting the Scene*, in Ollus, N., & Jokinen, A., & Aromaa, K., (eds.) *Trafficking for Forced Labour and Labour Exploitation in Finland, Poland and Estonia*, FLEX-HEUNI (2011), p.474.

<sup>94</sup> Chuang, J., ‘Beyond a snapshot: Preventing human trafficking in the global economy’, (2006) *Indiana Journal of Global Legal Studies* 13(1), 137-163, p. 140.

<sup>95</sup> UNODC, *Global Study on Smuggling of Migrants*, (2018), p.42. For further discussion on the complexity of labelling and categorising migrants see McAdam, M., ‘Who’s Who at the Border? A rights-based approach to identifying human trafficking at international borders,’ (2013) *Anti-trafficking Review* issue 2, 33-49 and IOM (2003), p. 7.

<sup>96</sup> Lewis, H., Dwyer, P., Hodgkinson, S., & Waite, L., (eds) *Precarious lives: forced labour, exploitation and asylum*, (Bristol: Policy Press, 2015), p. 21.

<sup>97</sup> Anti-Slavery International (2006), supra n. 55, p. 6; Plant, R., ‘Foreword’, in Andrees, B., & Belser, P., (eds) *Forced Labour: Coercion and Exploitation in the private economy*, (New York: Lynne Reiner Publishers, 2009, p. xiii.

Protecting the human rights of exploited workers will however require consideration of the neoliberal nature of the global economy that has seen a proliferation of non-standard work practices, deregulation, flexibilisation and casualised, low paid employment.<sup>98</sup> Additionally, the current approach to tackling labour exploitation has directly evolved from the responses to human trafficking to sexual exploitation. As a result, they have focused upon a victim centred approach, which is premised upon the individual's situation *after* the exploitation has occurred. The application of a labour approach would assist in ensuring a sense of balance between the needs of the victim once they have been identified post-exploitation and, as Muskat Gorska advocates, 'intervention into the exploitation cycle before the employment situation – individual or collective – turns into forced or trafficked labour.'<sup>99</sup> We suggest that addressing non-compliance with labour market standards, which according to Ollus & Jokinen are more easily detectable and are often precursors to trafficking,<sup>100</sup> would ensure prevention efforts are more effective. To this end, it is important to recognise Edwards' call for a labour market approach to comprise the strengthening of labour institutions and the supervision of labour standards in *both* origin and destination countries.<sup>101</sup>

The strength of engaging with a labour approach is premised upon its ability to regulate and intervene in the labour market where problems arise in an employment context. However, it must be noted that the current approach to minimising the abuse of unequal bargaining power is limited to political structures dealing with conventional labour markets. Therefore, in order to effectively tackle exploitation by applying a labour approach, we must consider Zatz's insistence that the labour market must allow for the inclusion of non-market forms of work in its ambit clearly demonstrating that the prohibition of exploitation is grounded as a foundation a labour law.<sup>102</sup>

Whilst adopting a labour lens has its advantages in so far as it recognises the inter-linkages between migration, labour and trafficking, we do acknowledge the limitations of such an approach. For instance, it can downplay the serious human rights

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<sup>98</sup> Anti-Slavery International (2006), *supra* n. 55, p. 12; Omar Mahmoud, T., & Trebesch, C., 'The economics of human trafficking and labour migration: micro-evidence from Eastern Europe' (2010) *Journal of comparative economics* 38, 173 -188, p. 176; Edwards (2007-2008), *supra* n.77, p. 19. Ollus & Jokinen (2017), *supra* n.100, p.473.

<sup>99</sup> Muskat-Gorska (2017), *supra* n.97, p.460-461.

<sup>100</sup> Ollus & Jokinen (2017), *supra* n.100, p.476.

<sup>101</sup> Edwards (2007-2008), *supra* n.77, p. 41.

<sup>102</sup> Zatz, N., 'Discrimination and labour law', in Collins, H., Lester, G., & Mantouvalou V., (eds) *Philosophical Foundations of Labour Law*, (Oxford University Press, 2018), p. 171-172.

violations that occur throughout the process and can also cause difficulties in the context of redress or compensation since existing mechanisms in labour law do not have the same forms of remedy as the criminal law.<sup>103</sup> Furthermore, efforts must be made to remove restrictions of access to the labour market that can be the catalyst for migrants seeking access to the illegal labour market and economic sectors where the risk of exploitation is higher.<sup>104</sup> Consequently, the possibility of enforcement of these restrictive immigration measures leads to a lack of willingness to mobilise and take action against mistreatment at work.<sup>105</sup> Furthermore, the nexus between migration and labour regulation also leaves workers' vulnerable to exploitation without sufficient information on their rights at work, right to redress and right to access social security.<sup>106</sup> Such limitations can be avoided, and in this regard, we must insist on the existence of a distinct firewall between a labour approach that seeks to combat exploitation in the labour market and migration measures that are designed to control and restrict immigration but can fuel exploitation, such as enforcement of measures that seek to minimise illegal working but can be to the detriment of the safeguarding of the fundamental rights of irregular workers.<sup>107</sup> Once again, whilst it is important to acknowledge such limitations, we once again stress that these limitations can be overcome with the application of a comprehensive, multi-pronged approach.

## **6. Using fundamental rights to balance between a contextualised understanding and a tolerance of labour exploitation (Reflection 6)**

The need for a contextualised understanding of labour exploitation has not only emerged from the findings of the thesis but is also a key assertion made in the UNODC Exploitation Issue Paper stated that 'cultural and other context-specific factors can play a role in shaping perceptions of what constitutes exploitative conduct for the purposes of establishing trafficking.'<sup>108</sup> However, we suggest an element of caution when

<sup>103</sup> Edwards (2007-2008), *supra* n.77, p. 43.

<sup>104</sup> See for instance asylum seekers, 9 months restriction on access to labour market for asylum seekers, in Article 15(1), Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29.6.2013, p. 96–116; In practice, most Member States have introduced a lower time limit, see European Parliamentary Research Service, (2015) Work and social welfare for asylum- seekers and refugees Selected EU Member States, p.35. See for admitted migrants restrictions on freedom of choice of employment, ILO, Access to the labour market for admitted migrant workers in Asia and related corridors (February 2019).

<sup>105</sup> Lewis et al (2015), *supra* n. 103, p. 36.

<sup>106</sup> Anti-Slavery International (2006), *supra* n. 55, p. 11.

<sup>107</sup> International Organisation for Migration *Is trafficking in human beings demand driven? A multi-country pilot study*, Anderson, B., & O'Connell Davidson, J., Migration Research Series (2003), p. 7; FLEX, *Risky Business: Tackling Exploitation in the UK Labour Market*, (FLEX 2017), p.23.

<sup>108</sup> UNODC, *Issue Paper: The Concept of "Exploitation" in the Trafficking in Persons Protocol* (New York: United Nations, 2015), p.22, p.119, p.123; See also UNODC (2018), *supra* n.102, p. 24. Gallagher (2017), *supra* n.53, p. 103.

seeking to allow such flexibility in order to contextualise a situation (including the agency of the individual) as it may lead to an overly *laissez-faire* approach allowing for a tolerance of exploitation. Such a balancing act, we believe, can be achieved by ensuring that the protection of fundamental rights is at the core of any assessment of labour exploitation.

The international and national legal analysis demonstrates the contextual nature of exploitation by significant deference to national legal orders in the interpretation of international definitions of exploitation. To this end, in Chapter 1 we discussed the international definition of human trafficking and its value as an instrument that provides for the minimum standards or the lowest common denominator with the non-exhaustive list of exploitation and a lack of monitoring mechanism placing the onus on States to decide what constitutes human trafficking (Section 2.3). The flexibility permits States to determine the threshold of labour exploitation in accordance with their contextual variations (Section 1).

Furthermore, the contextualisation of labour exploitation in the findings suggests that the labour market is not always the locus of exploitation. The cases in the UK, whereby an individual's identity was being exploited for the purposes of benefit-fraud leading to debt bondage, shifts the locus of exploitation. Whilst, these fraudulent misrepresentations were almost always accompanied by a form of labour exploitation, it demonstrates that there is a need to assess the totality of the situation, including living and working conditions. It may be that "hidden third party exploitation" makes it difficult to discern the locus of the exploitation, wherein working conditions are not exploitative *per se*, e.g. tied accommodation, unlawful deductions, non-payment of tax, controlling of bank account, obligation to purchase services e.g. transport/clothing/translation.<sup>109</sup> The law must recognise and understand these different contexts to ensure the inclusion of non-market relationships within the material scope of exploitation as the theoretical models demonstrated in Chapter 5.

The legal analysis has revealed that labour exploitation must not only be contextualised in accordance with the standards of society, but also on a case by case

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<sup>109</sup> Skrivankova (2017), *supra* n. 81, p.115.

basis, as assessed in relation to *Tang & Kunarac* in Chapter 4. Concretely, where the complexity of the circumstances in the domestic cases often involves large numbers of witnesses/civil parties, it is important for each individual to be assessed separately, as it is possible that the relationship between the exploiter and the exploited party is not always the same (Chapter 9). For instance, some exploiters value certain individuals more than others, leading to a different degree of mistreatment and quality of relationship (Section 4). In particular, it is important that the agency of the individual is assessed according to their personal circumstances and not in comparison with another exploited party.

Overall, it is important for any understanding of exploitation to adopt an individualistic tailored approach that takes into account both labour and human rights standards. The recognition of structural and relational exploitation and vulnerabilities in the typology and conditions of exploitation in Chapters 5 & 6, further emphasises that a one-size-fits-all approach will not be appropriate when taking into account the complexity of the phenomenon of labour exploitation and different affects it has on different individuals as we saw in Chapter 9 with regards to different individuals being treated differently by the exploiters (Section 4).

Whilst the need to contextualise the interpretation of labour exploitation has been clearly presented, there is a need to ensure that such contextualisation does not constitute an overly *laissez faire* approach wherein a particular situation of exploitation is tolerated. The issue of tolerance of exploitation emerged in both the supranational legal analysis in Chapter 4 as well as in the typology of exploitation theory in relation to the Basic Needs Model in Chapter 5 and as a caveat to the conditions of exploitation in Chapter 6. Quite simply, in this regard, exploitation should be tolerated in non-ideal conditions wherein its prohibition or legal intervention would do more harm than good and as a result is the lesser of two evils. Such tolerance is, however, not absolute and as such exploitation (where justified) should be overlooked (not erased or cancelled).

The principal source of such tolerance is the lack of political will to ensure that such exploitative conduct is not tolerated. Historical accounts of the political and economic interests of the states involved in drafting the international legislation are indicative of such tolerance, as demonstrated by the incremental approach adopted to

the prohibition of forced or compulsory labour discussed in Chapter 3 (Section 1.1). The same position is evident in a contemporary context where, in the context of globalisation and deregulation, acceptance of exploitation is vital to upholding the power or prosperity of the economic or political elite.<sup>110</sup>

The legal handling of labour exploitation reinforces such a perception; wherein a global prohibition regime exists but lacks the proper enforcement for it to be meaningful.<sup>111</sup> The role of legal regulation is important here for two reasons. First of all, despite the moral paternalism of the legal regime when it comes to the most severe forms of exploitation e.g. slavery, servitude, forced or compulsory labour and human trafficking for labour exploitation, lesser forms of exploitation remain tolerated whereby they may well be regulated by civil or administrative sanctions but are not necessarily effectively implemented.<sup>112</sup> Secondly, where exploitation is formally prohibited, the substantive application of the law is in fact strategic, and could be interpreted as tolerance of exploitation. This has emerged from the file study, where there has been an overwhelming emphasis on homeless British nationals who are exploited by the Irish travelling community on the one hand, and on the other the Belgium system has a heavy focus on those who are undocumented and working in the informal labour market. The tolerance of exploitation and how it is regulated in law, is dependent upon the assessment of the wrong that is being punished, as it has a net cost to society, and not necessarily to the individual.<sup>113</sup> For example, in the case of England & Wales, the emphasis on the “hostile environment” as the priority of immigration law, has led to an emphasis on tackling “modern slavery” through the lens of homelessness, county drug lines and exploitation of minors, which accounts, perhaps, for the lack of undocumented migrant workers as victims in criminal cases. Conversely, Belgium’s emphasis on the combination of the criminal prohibition of human trafficking with social criminal law offences has led to an emphasis on the employment context and, by consequence, enforcement and regulation of labour standards. Evidently, there are limits to the intervention of criminal law, and as a result, it is for alternative forms of regulation to also be considered,<sup>114</sup> such as established principles in other areas of

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<sup>110</sup> Hathaway, J. ‘The Human Rights Quagmire of “Human Trafficking,”’ (2008) *Virginia Journal of International Law* 49(1), 1-59.

<sup>111</sup> See Chapter 3 on reinforcing and strengthening the prohibition of forced or compulsory labour in Sections 2-4.

<sup>112</sup> Wertheimer (1996), *supra* n.34, p. 305.

<sup>113</sup> Wertheimer (1996), *supra* n.34, p. 308.

<sup>114</sup> Wertheimer (1996), *supra* n.34, p. 309.



private or administrative law including, *inter alia*, the regulation of freedom of contract, the application of the doctrine of unconscionability, the defence of economic duress and the prohibition of abuse of dominance.<sup>115</sup> These particular mechanisms may also be more suitable to those situations of labour exploitation that may arise from the shift in the landscape of the contemporary labour market, but only should they be effectively implemented.

In particular, it is important to ensure that any conceptualisation of labour exploitation avoids co-opting a paternalistic approach that fails to sufficiently take into account the autonomy of the individual. However, there is increasing evidence that individuals are using their agency in a way that may contribute to the precarious nature of their employment.<sup>116</sup> The increasing shift away from the Standard Employment Relationship (SER) and workers' opting for other forms of more flexible employment, that may in some instances impact negatively on individuals, as such forms of employment lead to precarious working conditions, particularly in working hours and income.<sup>117</sup> Furthermore, in light of the previous discussion on structural forms of vulnerability, it is important to note that these new forms of employment adversely impact low skilled workers and vulnerable groups of workers e.g. young workers, female workers, migrant workers.<sup>118</sup> With this in mind, commentators have suggested that the validity of legal paternalism is justified, in a global era where 'the inherent imbalance in power between employers and unorganised employees has not vanished, but rather has intensified.'<sup>119</sup>

The extent to which exploitation is tolerated, depends upon the willingness to accept its inevitability as a consequence of the structural factors that contribute to its

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<sup>115</sup> For discussion on doctrine of unconscionability in contract law see Hill (1994), *supra* n.12, p. 633 & Wertheimer (1996), *supra* n.34, p. 49 & 76.

For discussion on defence of economic duress & prohibition of abuse of dominance in competition law see Pınar Akman, 'The relationship between economic duress and abuse of a dominant position', *Lloyd's Maritime and Commercial Law Quarterly* 2014, 1(Feb), 99-13.

For discussion on inequality of bargaining power in contract law see Wertheimer (1996), *supra* n.34, p. 50 & p. 65.

<sup>116</sup> See discussion on strategic acceptance in Berntsen, L. E., 'Reworking labour practices: on the agency of unorganized mobile migrant construction workers,' (2016) *Work, employment and society* 30(3) 472–488.

<sup>117</sup> Kenner J., 'Inverting the Flexicurity Paradigm: The United Kingdom and Zero Hours Contracts,' in Ales E., Deinert O. and Kenner J., eds., *Core and Contingent Work in the European Union: A Comparative Analysis* (Hart: 2017), 153-183; Kenner J., 'Uber Drivers are 'Workers' – The Expanding Scope of the 'Worker' Concept in the UK's Gig Economy,' in Kenner J, Floreczak I & Otto M (eds), *Precarious Work. The Challenge for Labour Law in Europe* (Edward Elgar, 2019, Forthcoming).

<sup>118</sup> See for example, the overview of zero-hours contracts in Deakin, S., 'New Forms of Employment: Implications for EU Law – The Law as It Stands' in Blanpain, R., Hendrickx, F., and Waas, B., (eds) (2016) *New forms of employment in Europe, Bulletin of comparative labour relations* Volume 94, 43.

<sup>119</sup> Dahan, Y., Lerner, H., Milma-Sivan, F., 'Global justice, labor standards and responsibility,' (2011) *Theoretical Inquiries in Law* 12, 439, p. 456.

creation. The factual circumstances in *Chowdury* presented in Chapter 3 highlighted such a situation, whereby the domestic authorities had engendered a systemic acceptance of the non-payment of wages to irregular migrant workers. One societal consequence of such acceptance of dismal working conditions for this particular group of labourers, that are known to be at increased risk of abuse in the employment context, arguably stems from the ‘the normality of labour exploitation under capitalism.’<sup>120</sup> The European Court however did not accept such a justification premised upon “coercive governance” for the exploitation endured by the migrant workers and placed greater emphasis on the protection of their fundamental rights regardless of their migration status.<sup>121</sup> The role of the national courts is also of significance in this regard, when ensuring that the penalty imposed is sufficient to recognise the impact of the exploiter’s actions not only on the individual but on society overall.

## **7. Concluding Remarks**

The effectiveness of the proposed legal conceptualisation of labour exploitation presented in Chapter 11 will depend upon other factors both within and beyond the parameters of the law. To ensure that any application of the legal conceptualisation of labour exploitation is as effective as possible we have, in this chapter, presented six reflections that have emerged from the findings of this thesis. However, it is important to note that we do not seek to present these reflections as an exhaustive list of factors to be considered. Indeed, others may well arise in different legal, social and economic contexts, thus requiring continuous assessment and reflection.

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<sup>120</sup> Manzo, K., ‘Modern slavery, global capitalism and deproletarianisation in West Africa’ (2005) *Review of African Political Economy* 106, 521-534p. 523.

<sup>121</sup> Berman, J., & Friesendorf, C., ‘EU Foreign Policy and the Fight Against Human Trafficking: Coercive Governance as Crime Control’, (2008) *European Foreign Affairs Review* 13, 189–209, p.194.

## **CONCLUSION**

### **1. Summary of findings**

The overall objective of the thesis was to conceptualise labour exploitation in order to better clarify the material scope of the concept in the context of human trafficking law and to consider its applicability as a standalone form of exploitation. In order to reach a scientifically robust response to the overall purpose and object of enquiry of the thesis the analysis not only consisted of a cross-disciplinary exploration of law and political theory, but also engagement with supranational and national legal spaces.

#### **1.1. State-of-the-art legal understanding of labour exploitation in international and regional law (Part I)**

The first part of the thesis identified the state-of-the-art legal understanding of labour exploitation in international and regional law. The principal forms of exploitation analysed included human trafficking for the purposes of labour exploitation (Chapter 1), slavery, practices similar to slavery and servitude (Chapter 2) and forced or compulsory labour (Chapter 3).

In Chapter 1, we demonstrated that despite the increased recognition of human trafficking for the purposes of labour exploitation at the supranational level, following the international definition of human trafficking and the expansion of its scope to include labour exploitation there is still a lack of clarity regarding the scope of the exploitation concept. This is principally the result of a categorical, non-exhaustive approach to the purpose element of exploitation and its lack of definition in law. Consequently, the lack of a definition of exploitation in human trafficking has led to a number of issues, namely a **conflation and confusion in terminology** that has fostered a **stereotypical understanding** of labour exploitation leading to a **fragmented and inconsistent** domestic implementation that perpetuates **legal uncertainty**. Such issues have been further perpetuated by a lack of guidance and assistance from international and regional bodies to ensure domestic application provides for legal certainty and the limited judicial engagement with human trafficking in regional courts. This has been notably demonstrated by the European Court of Human Rights Article 4 jurisprudence which has not yet provided clarification of the material scope of the provision, despite human trafficking being held to fall within the material scope of Article 4 even though it is not explicitly mentioned, in light of the “living instrument” doctrine.

Chapter 2 considered the global prohibition mechanisms of slavery, servitude and practices similar to slavery that have led to a stimulation of shared values, a voluntary prohibition of slavery by State parties and the gradual elimination of the origins and causes of this conduct. However, despite the global prohibition making headway, a lack of adequate international implementation and enforcement of the existing international legislation has seen a resurgence in contemporary forms of slavery, that require continued engagement with the prohibition of slavery. In contrast to the case law on human trafficking, the recent but limited judicial engagement with slavery, servitude and practices similar to slavery provides an important platform from which to re-engage with the better handling and demonstration of intolerance of such conduct.

Chapter 3 illustrated that forced or compulsory labour has seen legal and policy developments in light of the need to adapt to the contemporary context that is predominantly characterised as a shift from a State sponsored activity to a form of exploitation that predominantly occurs in the private economy. The judicial

understanding of forced or compulsory labour – albeit limited - has provided critical insight into the key features of exploitation such as the exercise of control that fosters dependence and lack of viable alternatives.

Despite these important judicial developments for all forms of labour exploitation, the understanding of labour exploitation in law remains ambiguous due to the absence of a legal definition. Chapter 4 tackled this issue by taking stock of the state-of-the-art understanding of labour exploitation in law by identifying the key emerging elements of exploitation and the key obstacles that continue to hinder the legal clarification of exploitation. The focus on exploitation in the human trafficking definition is of critical importance when the international definition is increasingly being recognised as a pivotal aspect to the anti-trafficking and modern- abolitionist movement. The identified obstacles arising from a lack of definition, whilst not insurmountable, still impact on the overall objective of clarifying the scope of exploitation in law, in order to determine the threshold between non-exploitative circumstances and exploitation. Part I of this thesis concludes that the lack of engagement by the international community in clarifying the legal scope of exploitation leaves the issue both politically and legally hanging in the balance.

## **1.2. Exploration of exploitation and its constituent conditions in theory (Part II)**

Taking into account the situation as to the state-of-the-art legal understanding of exploitation, Part II shifted the disciplinary lens onto exploitation in political theory as a way of assisting with the legal conceptualisation of exploitation. Chapter 5 explored the conceptualisation of labour exploitation in theory. The resulting typology of exploitation reflects the wide-ranging understanding of exploitation across the spectrum of political theories, with three models of exploitation identified: Redistribution Model, Human Dignity Model and Basic Needs Model. One commonality that emerged from all three models is the need to ensure that any conceptualisation of exploitation goes beyond economic relations by incorporating non-market relations. The exploration of exploitation in political theory raised an important issue: the non-interference with exploitation. The theoretical tolerance of

exploitation does not seek to discard the moral wrong of exploitation, but rather permits it to be overridden in certain circumstances. The tolerance of exploitation is closely tied to the work of scholars who insist on the importance of ensuring that any efforts at tackling human trafficking or exploitation do not fail to acknowledge the structural factors that can contribute to the creation and maintenance of the phenomenon in a global market economy.

Chapter 6 used the typology of exploitation theories to identify the conditions of exploitation in theory and to highlight where there are synergies with the legal elements identified in Part I. This first step towards a conceptual clarification of exploitation categorised the process of exploitation into three stages: **background, procedural and substantive**. Within each of these stages, the following conditions were identified:

- Background conditions - **imbalance of power** and **position of vulnerability**
- Procedural conditions - **taking unfair advantage** and **consent**
- Substantive conditions - **benefit** and **detriment**.

These conditions of exploitation individually do not amount to exploitation. However, cumulatively they may be indicative of exploitation.

### **1.3. The formal and substantive criminalisation of labour exploitation in national legal orders: Belgium and England & Wales (Part III)**

The findings in the first two substantive parts of the thesis contributed to the development of an analytical framework which was used to comparatively analyse the formal and substantive criminalisation of labour exploitation in two national legal orders: Belgium and England & Wales. Following an overview of the methodological considerations and the contextualising features of the file study in Chapter 7, Chapter 8 analysed the formal and substantive criminalised of labour exploitation in the domestic legal orders. The analysis considered the formal legal development and the substantive judicial application of the offences of labour exploitation in the two case studies. The analysis revealed that the “**domestic**” **implementation of the human trafficking offence is fragmented**, with non-inclusion of the means elements as a

constituent element of the offence in both jurisdictions and in England & Wales, the action element is restricted to the arranging or facilitation of travel only. Secondly, the **human trafficking offence is given primacy in criminal law**, as exemplified by the non-recognition of standalone offences in Belgium and a wider understanding of exploitation in the context of human trafficking as compared to non-trafficking situations in England & Wales. Thirdly, the file study revealed that **the scope of exploitation is broadly understood but requires further clarification to guard against confusion.**

The role of the judiciary in providing such clarification was considered in Chapter 9, with an analysis of the judicial interpretation of the domestic legal framework that criminalises labour exploitation. The analysis of the judicial interpretation of domestic law has proven to be invaluable, especially in light of the limited ECtHR jurisprudence on Article 4. Despite some key differences between the two jurisdictions, the file study revealed, a number of **key elements of labour exploitation** that emerged in both. First of all, the role of the exploiter demonstrates that situations of labour exploitation are the result of calculated decision making, such as targeted recruitment wherein a *position of vulnerability is knowingly abused* for own benefit, whilst displaying a *lack of respect for human dignity*. The relationship between the exploiter and the victim is characterised by the *exercise of control/authority* over the *totality of the situation*, leaving the individual in a *position of dependence* where there is *a difficulty to change their circumstances*.

In Chapter 10 we further illustrated the nuance of law in action, by discussing the judicial use of indicators as a tool to assist the qualification the nature of exploitation. These indicators emphasise that the assessment of exploitation does not only refer to working conditions but also to living conditions. The use of indicators is also used when determining the penalty, wherein the assessment of the degree of exploitation gives weight to the benefit received by the exploiter as an aggravating factor and the agency of the individuals as a mitigating factor.

## 2. The answer to the research question

The thesis embarked upon an exploration of the understanding of exploitation in both law and theory with a view to furnishing a response to the main research question: *how can labour exploitation be conceptualised in law specifically in the context of human trafficking and should it be established as a standalone criminal offence?*

First of all, we will address the first part of the research question: *how can labour exploitation be conceptualised in law specifically in the context of human trafficking?*

The findings from the research have led to an evidence-based articulation of a legal conceptualisation of labour exploitation (Chapter 11).

***A knowingly taking unfair advantage of B's position of vulnerability by means of the exercise of control showing a lack of respect for B's human dignity, in order to gain a benefit.***

We believe that the proposed conceptualisation identifies the constituent elements of exploitation that are necessary to determine whether or not the provision of work or services has been abused. The proposal's use of standardised language and its development in light of existing law and practice means that it offers an opportunity to strengthen the existing responses against the exploitation of other's work or services. In this regard, the proposed conceptualisation provides clarity to the law in four ways:

- i) in light of the non-exhaustive categorical enumeration of forms of exploitation in the human trafficking definition, it provides clarity as to the scope of labour exploitation within the paradigm of human trafficking;
- ii) in view of the three constituent elements of the human trafficking definition, it can apply to situations of labour exploitation that do not qualify as human trafficking due to the absence of one or more of the constituent elements of the trafficking offence itself;
- iii) in light of limited case law, it can be operationalised to better understand the material scope of slavery, servitude and forced or compulsory labour;



- iv) where slavery, servitude and forced or compulsory labour are not formally criminalised as standalone offences, it offers an alternative avenue for protecting those who are vulnerable and may be exploited.

The findings and the proposed legal conceptualisation of labour exploitation resulting from this scientific research are primarily aimed at an academic audience and engaging with the academic literature exploring the topic of labour exploitation and human trafficking. In particular, the proposed conceptualisation not only builds upon and integrates itself in the current debate of these topical issues but also formulates original findings and insights.

Furthermore, taking into account the principal data sources and the main concerns raised in scholarship regarding the lack of understanding of the material scope of labour exploitation for practitioners, this research also aims at offering assistance and guidance to the judiciary when seeking to implement the domestic legal framework. This thesis not only presents an up-to-date and informed analysis of the national case law in this field but also offers a possibility for judges to obtain clear information on the trends emerging in the case law. The analysis may also be of interest to judges active in other countries, or in supranational courts, such as the ECtHR, as it offers a comparative law approach to the issue, taking as case-studies two States representative of different legal traditions (civil law and common law).

Finally, the research also contributes to ongoing and emerging policy-debates and thus also targets policy-makers and other stakeholders interested in the evolution of the approach towards human trafficking and labour exploitation at national, European and international level.<sup>1</sup> The conceptualisation of labour exploitation is particularly of utility with regards to the further elaboration of legal measures, soft or

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<sup>1</sup> International: Intervention by Maria Grazia Giammarinaro, UN Special Rapporteur on Trafficking in Persons, especially Women and Children on the need for a broader application of labour exploitation in presentation given at JUSTICE AT LAST - European Action for Compensation for Victims of Crime International Exchange Seminar 27-28 May 2019.

Regional: Council of Europe, *Ready for future challenges - Reinforcing the Council of Europe - Report by the Secretary General for the Ministerial Session in Helsinki*, 16-17 May 2019, CM-Public SG (2019) 1 01/04/2019, p. 29; Directorate General for External Policies of the Union, *Study on Contemporary forms of slavery*, (December 2018), p.6.

National: See Dutch Conceptual Framework developed as part of the labour exploitation thematic programme by the Inspection Service in 2016 with categorisation of serious disadvantage and serious violations A form of social economic crime in which employers consciously and intentionally violate laws and regulations. This concerns workers who are not exploited in the strict sense (in accordance with Article 273f) or for which this is not proven, but who have to do with underpayment, long working days, fines and (sexual) intimidation, and as such “become serious disadvantaged.”, Inspectie SZW, Jaarverslag 2016, p.24 and Intervention by Luuk Esser, Dutch National Rapporteur at FNV Expertmeeting arbeidsuitbuiting, Utrecht, 21 November.

binding, that will determine future engagement with this issue. As can be seen from the recently adopted reforms that form part of the labour mobility package under the European Pillar of Social Rights including the newly adopted Directive on transparent and predictable working conditions and the imminent establishment of the new European Labour Authority.<sup>2</sup> It may serve to improve the policy response to human trafficking and its adequacy to address the conundrum of behaviours relating to the exploitation of the work of others.

Secondly, we refer to the second part of the research question: *should labour exploitation be established as a standalone criminal offence?*

The research question makes reference to labour exploitation as a standalone criminal offence and in light of current efforts at national, regional and international level, it would appear that this would be a logical place to start. However, the research has highlighted that the situation is much more complex than merely introducing a new crime - be it domestically, regionally or transnationally - and as such a much more nuanced approach must be adopted (see Chapter 12). Taking into account the criticism of any approach that is overly focused upon criminal justice and the need to move beyond the criminal law to also consider regulatory efforts to combat structural exploitation we believe that the legal conceptualisation of exploitation is robust enough to be applicable beyond the context of criminal law. The significance of the conceptualisation is not about where it is positioned, but rather that regardless of how it is implemented the material scope will be consistent by virtue of the identification of the key elements of the concept. The comparative analysis revealed that despite the application of two very different approaches in practice, the core components of the understanding of exploitation are the same (Section 1, Chapter 9). It is these core components that are reflected in the proposed conceptualisation.

Furthermore, the application of the conceptualisation will inevitably vary. As the findings of the research showed, the understanding of exploitation in law is twofold

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<sup>2</sup> See for instance the recent adoption by the Council of two key developments in the labour mobility package of the European Pillar of Social Rights, namely the Directive of the European Parliament and of the Council on Transparent and Predictable Working Conditions in the European Union; Regulation of the European Parliament and of the Council establishing a European Labour Authority, amending Regulations (EC) No 883/2004, (EU) No 492/2011, and (EU) 2016/589 and repealing Decision (EU) 2016/344 adopted on 13 June 2019.

with a distinction made between nature and degree (Chapter 10 and Section 2.1 in this chapter). Here we emphasise that the proposed conceptualisation of exploitation outlines the nature of exploitation. How it is applied in practice can differ according to the weight given to the *degree* of exploitation as will be reflected in the penalties e.g. administrative or criminal or quasi-criminal (Section 1, Chapter 12).

Finally, it is important to stress that any imposition of a general offence of exploitation would not replace any of the existing forms of exploitation that are prohibited, either as standalone offences or in the context of human trafficking. Instead, the threshold of a general offence would represent a lower form of abuse that fills the regulatory gap that currently exists in the “grey area” between forced or compulsory labour and labour rights violations (Section 3, Chapter 12). The proposed conceptualisation, in this regard can be likened to the Dutch approach whereby a distinction is made between exploitation in the context of human trafficking and social economic crimes that are labelled as serious disadvantages or violations.

Ultimately, the proposed conceptualisation of exploitation provides significant guidance as to the material scope of existing or even future regulatory efforts to tackle labour exploitation.

### **3. Added value of the legal conceptualisation of labour exploitation**

The inclusion of contemporary forms of labour exploitation in Target 8.7 of the Sustainable Development Goals, has been heralded as ‘a historic opportunity’,<sup>3</sup> as it reinforces the global recognition and ensures global engagement to combat contemporary forms of exploitation.<sup>4</sup> However, in turn, there is a concern that efforts to implement the ambitious and far-reaching 2030 Agenda will be jeopardised by a lack of sufficient resources and a fragmentation in implementation efforts, as identified by the emergence of different initiatives that foster a “cherry-picking” response to different targets and goals.<sup>5</sup> Another example of continued calls for improvement to the existing

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<sup>3</sup> UN, *Report of the Special Rapporteur on Contemporary forms of slavery, including its causes and consequences*, Doc. A/72/139, (United Nations, 2017), p. 13.

<sup>4</sup> Dottridge, M., ‘Trafficked and Exploited: The Urgent Need for Coherence in International Law’, in Kotiswaran, P., (ed.) *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, (Cambridge: Cambridge University Press, 2017), p. 78.

<sup>5</sup> UN (2017), *supra* n.3, p. 15-18.

legal and policy frameworks that seek to tackle exploitation is the recent recommendation that the European Parliament should ‘adopt a new resolution on contemporary forms of slavery, acknowledging the definitional challenges posed by the concept and recommending the assessment of the possibility of drafting a new international treaty at the universal level.’<sup>6</sup> These proposals can be compared to the diverging initiatives taken in the late 1990s, revealing at the time an increasing shared concern regarding trafficking in human beings, but a lack of a consistent approach. Like the adoption of the UN protocol containing the internationally agreed definition of human trafficking helped to clarify the debates, the conceptualisation of labour exploitation responds to a similar logic. It intends to bridge these various initiatives in offering a generally applicable concept that allows to clarify the behaviours covered by the notion of labour exploitation in criminal law. The concept proposed can serve as a basis for further discussions. Yet there is clearly more to be done.

Taking into account the purpose and target audience of this proposed legal conceptualisation of labour exploitation as outlined in the previous section, the following points outline its added value in a contemporary setting:

***i) Provides legal certainty of the material scope of exploitation element in the human trafficking definition.***

The formulation of the legal conceptualisation of labour exploitation is considered to be logical as it is built on existing concepts and legal principles that are already applied in the context of human trafficking. The exploitation element provides a framework from which the factual circumstances can be assessed, permitting for flexibility should new trends emerge in the human trafficking phenomenon whilst ensuring consistency in application when combined with the other constituent elements of the human trafficking offence.

Such legal certainty is not only relevant to the judiciary, but a whole range of actors who are engaged in the prevention and prosecution of human trafficking as well as the identification and protection of victims. For instance, the features of exploitation that are instilled in the legal conceptualisation are of utility for frontline professionals

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<sup>6</sup> Directorate General for External Policies of the Union (2018), *supra* n.1, p.53.

who can use it as a tool when working with potential victims to explore their lived experience of exploitation.<sup>7</sup>

***ii) Moves towards an offence of general exploitation in national legal orders***

In addition to the criminalisation of human trafficking for the purposes of sexual exploitation, national legal orders also include in their criminal legal framework offences that prohibit forced prostitution of others that are more broadly referred to as sexual exploitation offences. In the same vein, it is contended that the legal concept of labour exploitation could form the basis for an offence of general exploitation that can be applied to national legal orders. The suggestion of the adoption of a general offence was broached in the pre-legislative scrutiny of the Modern Slavery Act 2015, but ultimately did not find traction and remains sidelined. We support the efforts made to introduce the offence in such a way that moved beyond the categorical approach and sought to capture the essence of exploitation, particularly with reference to the means used to exert control over an individual and the agency of the individual and their ability to escape from the situation.<sup>8</sup> A true conceptual clarification of general offence of exploitation in criminal law will require a definitional approach, which this thesis offers by way of the conceptualisation of labour exploitation.

***iii) Facilitates formal and substantive regulation of labour exploitation beyond criminal law***

The need for regulatory plurality has long been voiced by those who recognise that criminal law is one piece of the regulatory puzzle that aims to tackle human trafficking and others forms of exploitation in the context of the global labour market.<sup>9</sup> For such pluralism to be achieved in practice, it will require not only further engagement with ensuring the effectiveness of criminal justice response but also reflection upon the gaps

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<sup>7</sup> For example, following preliminary presentation of research findings to social workers at PAG-ASA, a specialized human trafficking centre in Belgium, one worker informed the researcher that they had used the conceptualization of labour exploitation as a tool whilst engaging with a potential victims and explaining the availability of victim support and assistance in Belgium.

<sup>8</sup> See amendments tabled in Committee Stage in both Houses during passage of the Modern Slavery Bill, Amendment 25 in Committee Stage see HL, Marshallled list of amendments to be moved in committee 28.11.2014, Amendment NC17 in Committee Stage, see Notice of amendment given on 28 August 2014 and Amendment NC4 tabled in in Committee Stage, see Notice of amendments given up to and including 16 October 2014.

<sup>9</sup> See discussion in Chapter 4 on need to ensure labour approach is integrated in measures taken to tackle labour exploitation. For further discussion on labour approach see Shamir, H., 'A labor paradigm for human trafficking', (2012) *UCLA Law Review* 60, 76 – 136. Muskat-Gorska, Z., 'Can labour make an effective contribution to legal strategies against human trafficking?', in Piotrowicz, R., Rijken, C., and Uhl, B. H., (eds) *Routledge Handbook of Human Trafficking*, (Routledge, 2017); Bravo, K., 'Free labour! A labour liberalization solution to modern trafficking human beings' (2009) *Transnational Law and Contemporary Problems* 18, 545-615; Pope, J., 'A free labor approach to human trafficking', (2010) *University of Pennsylvania Law Review*, 158, 1849- 18755.

in existing labour law frameworks that in some instances foster exploitation.<sup>10</sup> The application of the legal concept of exploitation provides a legal standard that can be applied in multiple regulatory regimes, thereby overcoming the “grey area” between extreme exploitation and instances of exploitative labour practices.

#### *iv) Emphasising the primacy of human rights*

The human rights-based approach to combating human trafficking has been at the forefront of efforts to develop a comprehensive and holistic response to tackling the phenomenon.<sup>11</sup> We believe that the legal conceptualisation we propose here furthers this goal by adopting a true human rights lens, when asserting that the substantive outcome is an affront to the human dignity of the exploited party.<sup>12</sup> Indeed, human dignity is a pillar of fundamental rights protection, as illustrated by the EU Charter Explanatory Notes that states that the inclusion of human trafficking stems directly from human dignity.<sup>13</sup> As has been done in the present thesis, ‘exploitation is understood as the assault on workers’ dignity through the instrumentalisation of labour for economic gain without respect for the minimum conditions of human existence or the inherent value and worth of the worker herself’.<sup>14</sup> As a consequence, addressing exploitation must be accompanied by appropriate measures that ensure the worker’s dignity is secure. This can be achieved by adopting a human rights-based approach in conjunction with an emphasis on securing the core international labour standards.<sup>15</sup>

## **4. Outlook and suggestions for future research**

As mentioned above, it is hoped that the application of the conceptualisation of labour exploitation in criminal law is not only useful for the clarification of the exploitation

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<sup>10</sup> Plant, R., ‘Combating Trafficking for Labour Exploitation in the Global Economy: The Need for a Differentiated Approach’, in Kotiswaran, P., (ed.) *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, (Cambridge: Cambridge University Press, 2017), p. 339-340.

<sup>11</sup> Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* E/2002/68/Add.1 (United Nations, 2002); Vermeulen, G., *La politique belge en matière de traite des êtres humains: Etat des lieux, évaluation et options futures*, Fondation Roi Baudouin (2006), p.65.

<sup>12</sup> Rittich, K., ‘Representing, Counting, Valuing: Managing Definitional Uncertainty in the Law of Trafficking’, in Kotiswaran, P., (ed.) *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*, (Cambridge: Cambridge University Press, 2017), p.247-248.

<sup>13</sup> Explanation on Article 5 — Prohibition of slavery and forced labour, Explanations relating to the Charter of Fundamental Rights, *OJ C 303, 14.12.2007*.

<sup>14</sup> Rittich (2017), *supra* n.12, p.248.

<sup>15</sup> FRA research has also emphasised that respect for human dignity is at the core of EU fundamental rights protection and is directly applicable to ensuring that workers’ rights are respected, see FRA, 2019, p. 27.

element of human trafficking for labour exploitation but also to a number of situations where the legal clarification of exploitation is not clear (see Section 2). With such a goal of application in mind, and the recent international and regional impetus to seek definitional clarification of exploitation in law, we identify three issues that can further ensure a vigorous and robust application of the proposed conceptualisation:

The choice of two comparative jurisdictions has ensured diversity, however their focus remains Eurocentric. Comparisons have been made with other national legal orders, where appropriate. However, the application of the proposed conceptualisation would be further enhanced by investigating the judicial application in non-European domestic legal orders in light of other regional developments. For example, in Australia following the entry into force of the Modern Slavery Act 2018 and in the Brazilian context following the 2016 judgment of the Inter-American Court of Human Rights in *Brasil Verde*.

Whilst the focus in the present thesis has been restricted to the criminal justice domain we have always been mindful of and acknowledged the need to apply a conceptualisation of labour exploitation beyond the criminal law, as we discussed in Chapter 12 (Section 6). In particular, it is clear that in order to truly tackle human trafficking and exploitation, there is a need for regulatory plurality. In this regard, further exploration of the proposed conceptualisation of exploitation should be undertaken in the context of labour law, for instance by exploring the content of employment tribunal judgments and the application of social criminal law frameworks in order to assess if and how the criminal law conceptualisation should vary across different areas of law. This will greatly enhance the value of the proposed conceptualisation as criminal law concepts are often restrictively interpreted in order to ensure legal certainty.

Finally, in order to be applicable to efforts seeking to combat structural exploitation, the application of the legal conceptualisation of exploitation needs to be further assessed in light of the complexity and multiplicity of actors potentially involved in the chain of exploitation. One limitation of the current articulation of exploitation, is the emphasis on the role of the exploiter – that corresponds to the requirement of intent for criminal liability to arise. However, in the context of structural

exploitation, the conceptualisation could be modified so that unfair advantage could be taken of the imbalance of bargaining power without knowledge of the position of vulnerability. Here, the Dutch Supreme Court Decision could be used as a yardstick, whereby the threshold of conditional intent meant that it was sufficient for the misuse of vulnerability to have been unconscious, with mere recognition of the vulnerability.<sup>16</sup> The application of this conditional *mens rea* into a corporate setting will require further research, as it must not dilute the meaning of exploitation and could also blur the boundaries between injustice and abuse that is not prohibited or regulated by law. Such considerations should be subjected to further analysis in order to clarify the exact scope of any legal obligations in the context of structural exploitation.

Overall, the proposed conceptualisation is a good starting point as it provides consistency and certainty for future efforts seeking to tackle labour exploitation. In addition it reflects the necessity of further academic engagement with this topic, especially in light of the apparent shift by the international community towards the adoption of a broader understanding of labour exploitation in a global, neo-liberal context that has seen both a diminishing role for national State based regulatory mechanisms and an increased precarity of working conditions.

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<sup>16</sup> Rijken, C., (ed.) *Combating trafficking in human beings for labour exploitation* (Wolf Legal Publishers, 2011), p. 499; UNODC, *Issue paper: Abuse of a position of vulnerability and other “means” within the definition of trafficking in persons* (New York: United Nations, 2013, p.68-69.



## **ANNEXES**



## **Annex 1 – Analytical framework for the conceptualisation of labour exploitation**

### **1. Background conditions: imbalance of bargaining power and position of vulnerability and/or inequality**

- i. Background circumstances of the exploited party*
  - a. Social
  - b. Economic
  - c. Cultural
  - d. Religious
  - e. Political
  - f. Psychological
  - g. Personal
  - h. Migration status
  - i. Other
- ii. Relationship between exploiter & exploited party*
  - a. Direct (A-B)
  - b. Indirect (A-B-C/Complex supply chain)
  - c. Familial (family member/relative)
  - d. Personal (friend/ friend of friend/acquaintance)
  - e. Professional (employer)
  - f. Other

### **2. Procedural conditions: taking unfair advantage and consent**

- i. Role of the exploiter*
  - a. Employer
  - b. Labour provider
  - c. Facilitator e.g. driver, landlord etc
  - d. Other
- ii. Attitude of the exploiter*
- iii. Means of control persons' capacity or resources*
  - a. Deception, Coercion, Fraud

- b. Restriction of movement, Isolation
  - c. Threat or use of force (physical/sexual)
  - d. Intimidation and threats
  - e. Retention of identity documents
  - f. Withholding wages
  - g. Debt bondage
  - h. Abusive working and living conditions
  - i. Excessive overtime
  - j. Abduction
  - k. Abuse of power or vulnerability
  - l. Giving payment or benefits
  - m. Exercise of control
  - n. Condition is unlikely to change
  - o. Obligation to live on premises
  - p. Other
- iv. *(In)voluntariness of the exploited party*
- a. Lacking resources/ needs & sufficiency standard
  - b. Lack of alternative
  - c. Other
- v. *Working and living conditions*
- a. Length of working day
  - b. Remuneration
  - c. Subsistence needs (transport, food, medical care etc.)
  - d. Accommodation
  - e. Restricted movement
  - f. Other

### **3. Substantive conditions: benefit and detriment**

- i. *Benefit (actual or perceived) to exploiter*
- ii. *Benefit (actual or perceived) to exploited party*
- iii. *Detriment to exploited party*
  - a. harm
  - b. affront to human dignity

- c. lack of respect
- d. degradation
- e. sufficiency/needs not met
- f. Other



## Annex 2 – List of cases accessed in Belgium (BE) and England and Wales (UK)

Code	Case citation
BE01	Corr. Charleroi, 19 mars 2010, 7ème chambre
BE02	Corr. Bruxelles, 20 avril 2010, 58ième chambre
BE03	Corr. Charleroi, 23 avril 2010, 7ème chambre
BE04	Corr. Dinant, 5 octobre 2010, 10ième chambre
BE05	Corr. Tournai, 4 novembre 2010
BE06	Corr. Charleroi, 10 december 2010, 7ème chambre
BE07	Corr. Charleroi, 18 mars 2011, 7ème chamber; Cour d’appel de Mons, 26 juin 2015, 4ième chambre
BE08	Corr. Bruxelles, 58e chambre, 10 mai 2011
BE09	Corr. Bruxelles, 29 juin 2011, 58ième chambre
BE10	Corr. Mons, 26 juin 2012, 10ieme chambre correctionnelle
BE11	Corr. Tournai, 6 septembre 2012, 19ième chambre correctionnelle
BE12	Corr. Charleroi, 26 octobre 2012, 7ème chambre correctionnelle
BE13	Corr. Liege, 14 janvier 2013, 14ème chambre correctionnelle; Tribunal d’appel Liege, 8 mai 2014; Cour de cassation, Bruxelles, 8 octobre 2014
BE14	Corr. Bruxelles, 22 janvier 2013, la 58ième chambre correctionnelle
BE15	Corr. Nivelles, 25 janvier 2013, 6ième chambre correctionnelle
BE16	Corr. Liege, 26 mars 2013; Cour d’appel de Liege, 26 juin 2014, 6ème chambre
BE17	Corr. Bruxelles, 26 mars 2013, 58ème chambre
BE18	Corr. Charelroi, 26 avril 2013; Cour d’appel de Mons, 13 janvier 2016, 4ème chambre
BE19	Corr. Bruxelles, 28 mai 2013, 58ème chambre
BE20	Corr. Charleroi, 7 juin 2013, 7ème chambre
BE21	Corr. Nivelles, 26 juin 2013, 6ème chambre
BE22	Corr. Liège, 2 septembre 2013, 14ème chamber; Cour d’appel de Liege, 12 mars 2015, 6ème chambre

BE23	Corr. Bruxelles, 6 janvier 2014, 58ème chambre
BE24	Corr. Charleroi, 21 mars 2014, 7ème chambre; Cour d’appel de Mons, 10 février 2016, 4ème chambre
BE25	Corr. Bruxelles, 3 avril 2014, 59ème chambre; Corr. Bruxelles, 19 février, 2015, 59ème chambre
BE26	Corr.Liège, 28 avril 2014, 14ème chambre
BE27	Corr. Luxembourg (Arlon), 8 MAI 2014, 7ème chambre; Cour d’appel de Liège, 14 janvier 2016, 6ème chambre
BE28	Corr. Hainaut, Division Charleroi, 13 octobre 2014; Cour d’appel de Mons, 24 février 2015, 3ème chambre
BE29	Corr. Bruxelles, 30 octobre 2014, 69ème chambre
BE30	Corr. Bruxelles, 11 février 2015, 49ème chambre
BE31	Corr. Bruxelles, 1er avril 2015, 69ième chambre
BE32	Corr. Brabant Wallon, 2 avril 2015, 6ème chambre
BE33	Corr. Namur, 5 mai 2015, 12ème chambre
BE34	Corr. Brabant Wallon, 6 mai 2015, 6ème chambre correctionnelle
BE35	Tribunal du travail francophone de Bruxelles, 18 juin 2015, 4ème chambre
BE36	Corr. Bruxelles, 19 juin 2015, 59ème chambre
BE37	Corr. Liège, 29 juin 2015, 18ème chambre
BE38	Corr. Namur, 29 juin 2015, 12ème chambre
BE39	Corr. Bruxelles, 04 septembre 2015, 69ème chambre
BE40	Corr. Bruxelles, 9 septembre 2015, 54ème chambre
BE41	Corr. Liège, 8 février 2016, 18ème chambre
BE42	Corr. Namur, 9 février 2016, 12ème chambre; Cour d’appel Liege, 8 decembre 2016
BE43	Corr. Hainaut, division Mons, 21 avril 2016, 8ème chambre extraordinaire
BE44	Corr.Liège, 25 avril 2016, 18ème chambre
BE45	Corr. Bruxelles, 25 mai 2016, 59ème chambre
BE46	Corr. Hainaut, division de Charleroi, 6ième chambre correctionnelle
BE47	Corr. Bruxelles, 23 juin 2017, 59ème chambre



<b>Code</b>	<b>Case citation</b>
UK1	<i>R v SK</i> (unreported, 16 March 2011) Southwark Crown Court <i>R v SK</i> [2011] EWCA Crim 1691
UK2	<i>R v RB</i> (unreported, 11 August 2011) Southwark Crown Court
UK3	<i>R v AO, AZ, MN and others</i> (unreported, 19 April 2012) Croydon Crown Court
UK4	<i>R v WC, JJC, JC, MC, JC</i> (unreported, 12 July 2012) Luton Crown Court <i>R v Connors</i> [2013] EWCA Crim 368
UK5	<i>R v JC, JC, MC, WC, BC</i> (unreported, 19 December 2012) Bristol Crown Court <i>R v Connors</i> [2013] EWCA Crim 324
UK6	<i>R v WC, JC, JC</i> (unreported 7 January 2013, 30 May 2013) Southampton Crown Court
UK7	<i>R v DS, RU</i> (unreported, 22 February 2013) Portsmouth Crown Court
UK8	<i>R v IB, AS, PD, KM, AK, AK, NK</i> (unreported, 10 October 2013) Preston Crown Court
UK9	<i>R v TA, IA, FA</i> (unreported, 23 October 2013) Manchester Minshull Street Crown Court
UK10	<i>R v JG</i> (unreported, 18 June 2014) Preston Crown Court
UK11	<i>R v JR</i> (unreported, 26 September 2014)
UK12	<i>R v DD, TD, DD</i> (unreported, 24 October 2014) Cardiff Crown Court
UK13	<i>R v BS</i> (unreported, 9 March 2015) Preston Crown Court
UK14	<i>R v HC, MJ, PJ, II</i> (unreported, 8 June 2015) Oxford Crown Court
UK15	<i>R v EE, AE</i> (unreported, 7 December 2015) Harrow Crown Court <i>Attorney General's Reference (Nos. 146 &amp; 147 of 2015) (Edet)</i> [2016] EWCA Crim 347
UK16	<i>R v GP, VJ, AP</i> (unreported, 11 December 2015) Nottingham Crown Court
UK17	<i>R v TJ</i> (unreported, 17 December 2015) Oxford Crown Court <i>R v Joyce</i> [2017] EWCA Crim 337
UK18	<i>R v RV</i> (unreported, 5 February 2016) Hereford Crown Court
UK19	<i>R v MR, MP, MD</i> (unreported, 18 April 2016) Leeds Crown Court <i>Attorney General's Reference (No.35 of 2016) (R. v Rafiq (Mohammed))</i> [2016] EWCA Crim 1368
UK20	<i>R v SA, DP, ZA</i> (unreported 1 April 2016) Woolwich Crown Court
UK21	<i>R v WC, PC, PJC, LC</i> (unreported, 24 May 2016) Cardiff Crown Court

UK22	<i>R v JM, SL</i> (unreported, 17 June 2016) St Albans Crown Court
UK23	<i>R v HC, MJ, CJ</i> (unreported, 31 August 2016) Oxford Crown Court
UK24	<i>R v KM, EM</i> (unreported, 23 January 2017) Nottingham Crown Court
UK25	<i>R v JO, AL, LP, SF</i> (unreported, 3 February 2017) Manchester Crown Court
UK26	<i>R v DA</i> (unreported, 19 May 2017) Snarebrook Crown Court
UK27	<i>R v RM, PM, SM, SS</i> (unreported, 30 May 2017) Newcastle Crown Court
UK28	<i>R v SB</i> (unreported, 15 June 2017) Nottingham Crown Court
UK29	<i>R v EB</i> (unreported, 3 July 2017) Manchester Crown Court
UK30	<i>R v MR, BR, PR, JR, NR, ER, MR, JR, PR</i> (unreported, 12 September 2017) Nottingham Crown Court
UK31	<i>R v EZ, FZ</i> (unreported, 30 October 2017) Nottingham Crown Court

## **Annex 3 – Coding template for data collection**

### **1) Details of the case and factual circumstances**

- a) Title/ case number, date
- b) court (first instance, appeal) and location
- c) judge
- d) procedural issues
- e) special measures
- f) offence(s) on indictment
- g) type of exploitation(s)
- h) verdict & sentence
- i) parties involved (civil parties, defendants, victims)
- j) Economic sectors where exploitation took place
- k) Working conditions
- l) Living conditions
- m) Role of the defendant
- n) The relationship between the defendant and the victim
- o) The background circumstances of the victim

### **2) Judicial weight given to the factual circumstances in determining the exploitation**

- a) Background factors:** position of the individual (background, vulnerability), migration status, psychological status, physical status e.g. disability, continuum
- b) Procedural factors:** (non)use of coercion by defendant & (in)voluntariness of the victim (consent and agency), inequality in bargaining power (conditions of exchange: lack of alternative), intention to exploit, exercise of control (resources and/or person),
- c) Substantive factors:** excessive benefit/loss, mutually advantageous, no actual benefit, real benefit, harm or otherwise impact on victim, lack of respect, sufficiency.

### **3) Reference to existing legal standards in judicial reasoning**

**4) Other factors of relevance**

- a)** Immigration status: undocumented and illegal working
- b)** Criminality of victim (non-prosecution principle)
- c)** Political, Socio-economic, Cultural, Miscellaneous/ Other factors

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